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NO.

THE UNITED STATES SUPREME COURT
OCTOBER 1994 TERM

ALVIN B. CUTLER and JOYCE P. CUTLER, et ux., et al.,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, a foreign corporation;

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal preemption of state common law causes of action applies under the Employees Retirement Income Security Act of 1974, 29 USC § 1101, et seq., when those common law causes of action (ERISA) are for wrongful termination of employment, and only tenuously involve an ERISA plan.

2. Whether ERISA preemption requires a determination that the claimants, in a wrongful employment termination lawsuit, were "participants" or "beneficiaries" of an ERISA plan which did not exist at the time the employees' employment was terminated.

PARTIES

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; MARVIN PAUL and JANICE PAUL, a marital community; RICHARD DAVIS and his marital community; FRED LINDBERG and his marital community; JERRY KOONTZ and his marital community; DAVID L. HOFFARTH and his marital community; RICHARD G. ALLEN and his marital community; and SUSAN R. HOOVER and ALLEN V. HOOVER, a marital community,

Petitioners,

and

PHILLIPS PETROLEUM COMPANY,

Respondent.

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I. REFERENCE TO REPORTS

The Petitioners request that this Court issue a Writ of Certiorari to review the decision in *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 216 (1994). The decision of the Washington State Court of Appeals is *Cutler v. Phillips Petroleum Co.*, 71 Wn.App. 511, 859 P.2d 1251 (1993). See Appendix, pp. 17-80.

II. GROUNDS OF JURISDICTION

Review of the Washington State Supreme Court decision of September 29, 1994, in this matter. Reconsideration of that decision was denied on December 13, 1994. The Supreme Court Mandate and Judgment in this case was entered in the trial court on December 19, 1994.

This Court has jurisdiction to issue the requested Writ of Certiorari pursuant to 28 U.S.C. Sec. 1651(a) and 28 U.S.C. Sec. 2104. See, also, Supreme Court Rules 10, 13.

This case involves a decision of the Washington State

Supreme Court which decided a federal question in a way that ignores and conflicts with numerous decisions of the United States District Courts, United States Courts of Appeal, and decisions of this Court.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, Section 2 of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C. Sec. 1001 provides, in relevant part:

> (b) . . . It is hereby declared to be the policy of this Act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. Sec. 1132 provides, in relevant part:

(a) . . . A civil action may be brought -

(1) by a participant or beneficiary -

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. Sec. 1144 provides, in relevant part:

(a) . . . the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ..

IV. STATEMENT OF THE CASE

A. The Supremacy Clause And Federal Preemption

This case involves the application of the Supremacy Clause of the United States Constitution, and federal preemption of causes of action brought by residents of Washington State, in their wrongful termination lawsuit against Phillips Petroleum Company. On September 29, 1994, the Washington State Supreme Court made a sweeping pronouncement giving virtually infinite application to the Employee Retirement Income Security Act of 1974 in

employer/employee lawsuits. See, *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 1251 (1994). Ignoring a vast body of decisional case law from the various federal District Courts and Courts of Appeal, the Washington State Supreme Court has, in this case, determined that ERISA preemption applies in cases that plead facts which only peripherally touch upon ERISA-based benefits and plans, which might only come into play as to the Plaintiffs' alleged measure of damages in such wrongful termination cases. This sweeping stroke cannot stand, as it usurps the States' interest in providing a forum for their residents to redress wrongs committed by employers, who might incidentally provide pension and other benefits to their employees.

Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114, 2129 (1981). State law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *Ridgway v. Ridgway*, 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49, 55 (1981).

Congress has preempted state law regarding the administration and operation of employer pension and benefit plans by enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. It was Congress' intent to devise and implement a uniform body of law concerning such employee benefit plans, to regulate the administration of those plans and those who administrate such plans. Yet, no where in that Congressional intent is it stated that ERISA was enacted to displace state laws concerning the relationship of employer and employee, or common law causes

of action for wrongful termination. Quite clearly, issues pertaining to those matters have been left for resolution by the various states, and under common law theories.

Inflexible application of the doctrine of preemption is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal regulatory scheme. *Sears, Roebuck & Co. v. San Diego County*, 436 U.S. 180, 56 L.Ed.2d 209, 98 S.Ct. 1745, 1753 (1978). Stated another way, where the alleged conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, it cannot be inferred that Congress has deprived the states of the power to act. See, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959). In this case, the State of Washington indeed has a substantial interest in protecting the rights of its residents, and the conduct of employers who wrongfully terminate those

residents' employment by artifice, trickery, or outright fraud. The interpretation or administration of any Phillips' benefit plan is most certainly not at issue in this case.

As generally stated in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615, 621 (1984), state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. Also, if Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent that it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Neither of these stated preemptive schemes applies to the Cutler Plaintiffs' wrongful termination claims against Phillips Petroleum.

The Cutler Plaintiffs respectfully submit that, following these preemption guidelines, the Washington State Supreme

Court erroneously applied the doctrine of preemption under ERISA, dismissing all of the Plaintiffs' common law claims against Phillips Petroleum Company. As such, the Washington State Supreme Court decision in *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 216 (1994), should be reversed, and the matter should be remanded to the trial court for further proceedings on the Plaintiffs' claims.

B. Facts Relevant To Petition

On March 12, 1991, the Plaintiffs filed their first Amended Complaint for Damages in this case. Regardless of its characterization by Phillips Petroleum Company (hereinafter "Phillips"), that Amended Complaint alleged the following.

Prior to December 1985, the Plaintiffs had long been loyal and valued employees of Phillips, most recently in its fertilizer and chemical divisions in Finley and Spokane, Washington. In December of 1985, in light of threatened hostile takeover activities by third parties, Phillips chose to financially restructure its organization by selling certain assets

for cash, including the proposed sale of the Spokane and Finley division assets, and their employees, to CEPEX American of Amarillo, Texas.

The Complaint further alleges, at paragraph IX, that Phillips sent a team of representatives to meet with its employees, including the Plaintiffs, in December 1985, to discuss their benefit options with Phillips and employment and benefit options available from buyer CEPEX. The Complaint specifically alleges, at paragraph IX:

> Defendant Phillips represented to the Plaintiffs that Phillips had protected each of them by contracting or otherwise agreeing with CEPEX concerning salary and benefits, and assured the Plaintiffs that any Phillips salary and benefits accrued by the Plaintiffs with Phillips would be intact without reduction for a minimum of two (2) years after the date of sale to CEPEX without reduction or elimination.

The thrust of the Plaintiffs' claims is found at paragraph X of the Amended Complaint, which alleges that Phillips represented to the Plaintiffs, in December 1985, that:

> . . . the sale of the fertilizer assets would be to

> a company with the financial ability and commitment to run the business for a substantial period of time.

Paragraph X alleges that the Plaintiffs relied upon those actions, representations and assurances by the Phillips representatives. Thereafter, as alleged, Phillips effected the sale of the fertilizer assets, and the Plaintiffs, to CEPEX on March 1, 1986.

Paragraph XI alleges that the Plaintiffs, save Plaintiff Jansen, relied upon the aforementioned representations and consented to their transfer of employment to CEPEX, without request for transfer within Phillips' organization, and without seeking employment elsewhere.

Yet, as alleged in the Amended Complaint, after the Plaintiffs were sold, Phillips announced a "Special Separation Program" on April 3, 1986, which included enhanced retirement benefits, severance pay, out-placement and housing assistance, and enhanced medical and life insurance benefits. That plan was available to Phillips' employees who chose to

separate from Phillips during a "window period" from April 3, 1986, through July 1, 1986. Certain of the Plaintiffs herein attempted to take advantage of that "Special Separation Program" after it was announced, but those requests were denied by Phillips because the Plaintiffs were not "Phillips' employees" as of April 3, 1986.

Paragraphs XIV, XV and XVI of Plaintiffs' Amended Complaint alleged that Phillips denied any attempts by Plaintiffs to stay with Phillips, and that Phillips vigorously encouraged the Plaintiffs to follow the transfers of assets to CEPEX without informing the Plaintiffs of the possibility of the "Special Separation Program" prior to March 1, 1986.

Thereafter, as alleged, on or about December 26, 1986, the Plaintiffs' employment with CEPEX ended, due to CEPEX' poor financial health, and contrary to the assurances and representations made by Phillips. Plaintiffs, therefore, alleged eight theories of recovery, which are: first, benefits unlawfully withheld under RCW 49.46.010, et seq.; second,

negligence; third, breach of contract; fourth, fraud; fifth, negligent misrepresentation; sixth, outrage; seventh, breach of fiduciary duty under 29 U.S.C. § 1101, et seq.; and eighth, age discrimination under either RCW 49.60.010, et seq., or 29 U.S.C. § 626.

Phillips answered Plaintiffs' Amended Complaint, by first admitting:

> X. . . . the defendant admits that fertilizer assets were sold to CEPEX effective February 28, 1986.
>
> . . .
>
> XII. . . . The defendant admits that a special separation program was announced by defendant as of April 3, 1986. . . .; but defendant affirmatively states that such program was available only to eligible employees; *because all of the plaintiffs separated from Phillips on February 2, 1986, they were ineligible.*
>
> XIII. . . . The defendant admits that when certain of the plaintiffs attempted to take advantage of the "special separation program," the plaintiffs were advised that *they were not Phillips "employees" on April 3, 1986* . . . .

Phillips alleged ten affirmative defenses, of which the following

are the most pertinent in this case, to-wit:

> 6. Plaintiffs' state law claims are preempted by federal law.
>
> 7. Plaintiffs' ERISA claims are within the exclusive jurisdiction of the federal courts.
>
> 8. Any action by the defendant in connection with the employment of the Plaintiffs was for *legitimate business reasons* and was not discriminatory, fraudulent, negligent, or in any way wrongful.
>
> 9. *On April 3, 1986, the Plaintiffs were not employees of Phillips Petroleum Company* and the express terms of the 1986 special separation program did not allow participation by the Plaintiffs.

In June of 1991, Phillips filed a motion with the trial court, under Washington Superior Court Rule 12(b)(6), to dismiss the case, based upon ERISA preemption. By Memorandum Opinion dated December 20, 1991 (Appendix A1-16), the trial court dismissed the Plaintiffs' first cause of action under RCW 49.46.010, et seq., as failing to state a cause of action under the Washington Minimum Wage Act, and also

dismissed the Plaintiffs' seventh cause of action, breach of fiduciary duty under ERISA, as that would be exclusively within the jurisdiction of the federal court. Having dispensed with those two claims, the trial court held:

> In this case, the Plaintiffs are not asking for enforcement of any benefits which may have been available to them under the Revised Retirement Plan or other benefit plan.
>
> They are, rather, alleging that the Defendant breached a contract or committed various torts which resulted in damage to them. It is true that some of the damages may be measured by the benefit plan which the Defendant had, however, it is this court's opinion that it is not the "essence" of the Complaint and therefore the motion to dismiss causes of action two through six will be denied.

Appendix, A1-16. An Order denying Phillips' Motion as to Causes of Action II through VI was entered on March 6, 1992.

Phillips appealed that decision to the Washington State Court of Appeals, Division III, which affirmed the trial court's decision on October 21, 1993. Appendix, A17-40. That Court specifically found that:

> Here, the employees' underlying theories revolve around Phillips' alleged misrepresentations regarding Cepex, not the denial of benefits. Simply put, the allegations are that Phillips made representations to these employees that induced them to transfer to Cepex. . . . If they are successful, the employees are entitled to recover damages which may be measured in part by benefits lost. The mere fact that they may be entitled to damages based on the loss of certain benefits in addition to salary and general damages should not result in their state law causes of action being preempted by ERISA.
>
> Phillips' position would require preemption of a cause of action arising in an employment relationship when benefits are one measure for an element of damage. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890, 2901 n.21 (1983). This suit is not based on an employee benefit plan. No benefit plan is regulated, directly or indirectly, by these state law causes of action. The employees' state law causes of action do not "relate to" an employee benefit plan and therefore are not preempted by ERISA.

Appendix, A34-36; *Cutler v. Phillips Petroleum Co.*, 71 Wn.App. 511, 521, 859 P.2d 1251 (1993).

On the issue of "participants", the Washington Court of Appeals also held:

> Moreover, if this court were to find the employees' state law causes of action preempted by ERISA, the employees would be placed in the unfair position of having no forum in which to raise their complaint regarding Phillips' conduct because they do not fall within the ERISA definition of "participant [29 U.S.C. Sec. 1132 (a)(2)]. . . .
>
> They are not plan participants as defined by 29 U.S.C. Sec. 1002(7) [noting that Phillips' original benefit plan, of which the plaintiffs were participants, was not at issue]. It would be ironic indeed if the employees, who admit they are not participants in the SSP, were denied state law causes of action by the adoption of a benefit program which followed their departure from Phillips.

Appendix, A36, 39-40; *Cutler v. Phillips Petroleum Co.*, 71 Wn.App. at 522-523.

In turn, Phillips requested review of the Court of Appeals decision by the Washington State Supreme Court. After argument, that Court rendered a decision on September 29, 1994, which reversed the previous decisions of both the

Spokane County Superior Court and Division III of the Washington State Court of Appeals, ruling that all of Plaintiffs' claims were preempted by ERISA, and therefore should be dismissed. In so ruling, the Washington Supreme Court stated:

> The [U.S.] Supreme Court now seems to be moving in the direction of an absolute pre-emption of state law by ERISA.

Appendix A66; *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 759, 881 P.2d 216 (1994), citing the *dissenting opinion* of Justice Stevens in *District of Columbia v. Greater Washington Bd. of Trade*, ___U.S.___, 121 L.Ed.2d 513, 113 S.Ct. 580, 585-588 (1992). The Washington Supreme Court characterized the claims herein as follows:

> However, as Petitioner Phillips points out, the essence of the claims is the [plaintiffs'] perceived loss of benefits under the special separation plan.

Appendix A72-73; *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 762. The Court followed this by stating:

> The most significant loss [plaintiffs'] suffered was their inability to participate in the ERISA-

> covered plan. They brought this lawsuit primarily demanding damages equivalent to the value of benefits under the plan. They claim Phillips encouraged them to transfer their employment to CEPEX in order to, among other things, exclude them from participation in the ERISA-covered special separation program. Because the court's inquiry must be directed to the plan, the entire action falls within the scope of ERISA pre-emption.

Appendix A75-76; *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 764.

On the "participants" issue, the Washington Supreme Court stated, in passing:

> [Plaintiffs] assert that if their claims are not allowed to proceed in state court, they will not have a forum in the federal courts. This is a matter which should be addressed to the federal courts.
>
> . . .
>
> Whether [Plaintiffs] would have standing under ERISA to bring their claims in federal court as "participants" in the special separation program is of little significance on the issue of pre-emption.

Appendix A74, 77-78; *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 763, 765.

The various bases for the Washington Supreme Court's

decision find no support in the record. It is apparent that both Phillips, in its arguments, and the Washington Supreme Court, focused only on paragraph XVI of the Plaintiffs' Amended Complaint. When read in light of the entire Complaint, paragraph XVI states nothing more than (a) Phillips' employees were sold as assets; (b) that the Plaintiffs were denied participation in an early retirement program announced *after their separation from Phillips*; and (c) others within the Phillips structure were allowed to take advantage of those programs *after the Plaintiffs' separation.* No where in the Complaint is it alleged that Phillips' *motive* was to prevent these Plaintiffs from taking part in an unannounced plan. Indeed, the "essence of the Plaintiffs' claims" were of wrongful termination and misrepresentation concerning the security of their employment, both with Phillips and with CEPEX.

Summarized, the Washington State Supreme Court Opinion erroneously applied ERISA preemption on two bases: (1) that the Plaintiffs' claims "related to" ERISA-covered

benefits plans to the extent that preemption was required; and (2) that the status of the Plaintiffs as "participants or beneficiaries" in the "special separation program" plan was not relevant to the determination of preemption. For the following reasons, the Plaintiffs respectfully submit that the Washington State Supreme Court decision herein is totally in error, and must be reversed by this Court.

C. The Plaintiffs' Claims Do Not "Relate To" An ERISA Plan At Issue

> Congress enacted ERISA to address particular social problems. Of specific concern was the widespread abuse by the fiduciaries of employee pension plans. Underfunded pension plans, irresponsible fiduciaries, and a generally depressed economic environment contributed to the likelihood that many employees might be unable to obtain pension benefits even as the entire work force aged and the social security system became more and more precarious.

H.R. Rep. No. 807, 93rd Congress 2d Session, *reprinted in* 1974 U.S. Code Congressional & Administrative News 4670, 4678-80; S.Rep. No. 383, 93rd Congress, 2d Session, *reprinted in* 1974 U.S. Code Congressional & Administrative

News 4890, 4899-4903. Indeed, this Court has recognized that intent, to-wit:

> Congress intended preemption to afford employers the advantage of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans, rather than simply to benefits.*

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 96 L.Ed.2d 1, 107 S.Ct. 2211, 2217 (1987) (emphasis added).

Here, the crux of the Plaintiffs' claims is that they were induced to stay with the Phillips' chemical and fertilizer division instead of seeking transfer or reassignment within Phillips. The Plaintiffs were sold to CEPEX in February, 1986, and thereby ceased to be employees of Phillips Petroleum. It is a fact, but not the basis of the lawsuit, that the Plaintiffs were unable to take advantage of any benefits which might have been offered by Phillips in the future, including the Special

Separation Program of April 3, 1986. However, the essence of Plaintiffs' claims has always been based upon wrongful termination.

The ERISA preemption clause is found at 29 U.S.C. § 1144, which is based the Supremacy Clause of the United States Constitution. It is fundamental that 29 U.S.C. § 1144(b)(2)(A) clearly shows that Congress did not intend to preempt entirely every state cause of action relating to retirement plans. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 77 L.Ed.2d 420, 103 S.Ct. 2841 (1983). That is, ERISA does not preempt state laws that generally relate to employee benefits. *Fort Halifax Co., Inc. v. Coyne*, 482 U.S. 1, 96 L.Ed.2d 1, 107 S.Ct. 2211 (1987). The Congressional purpose underlying the breadth of ERISA's preemption provision--to secure uniform federal laws relating to employee benefit plans--is not advanced by preemption of state common law claims which are not premised on a violation of the duties imposed by ERISA. *Albert Einstein Medical*

Center v. Action Manufacturing Co., 697 F.Supp. 883 (D.C. Pa. 1988).

Washington case law states that, in actions to enforce benefit rights under a plan covered by ERISA, federal substantive law controls; state law principles may be applied if compatible with federal policy. *Helper v. CBS, Inc.*, 39 Wn.App. 838, 696 P.2d 596 (1985). Therefore, it must be determined whether a state law claim "relates to" an employee benefit plan, in order to determine ERISA's preemptive application. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). In that case, this Court held that a law "relates to" an employee benefit plan *in the normal sense of the phrase* if it has a connection with or reference to such a plan. Id. 103 S.Ct. at 2900. Citing *Black's Law Dictionary* (5th ed. 1979), this Court noted that "relate" means "to stand in some relation; to have bearing or concern; to pertain, refer; to bring into association with or connection with." Id. Applying the logical meaning of the term, some

courts have linked the decision of whether a claim "relates to" a plan to a determination of whether adjudication of the state action would require the court to interpret or examine the plan or its terms. See, *Kentucky Laborers District Council v. Hope*, 861 F.2d 1003, 1005 (6th Cir. 1988); and *Whitworth Bros. Storage Co. v. Central States, SE and SW Areas Pension Fund*, 794 F.2d 221, 234 (6th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986). Such an interpretation is not required in this case. The claims made by these Plaintiffs do not "relate to" any Phillips employee benefit plan.

In its arguments before both the Washington Court of Appeals and Washington Supreme Court, Phillips relied heavily upon the cases *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 112 L.Ed.2d 474, 111 S.Ct. 478 (1990); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 95 L.Ed.2d 55, 107 S.Ct. 1542 (1987); and *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 95 L.Ed.2d 39, 107 S.Ct. 1549 (1987). At the various levels of Washington State appeals, the Plaintiffs herein

distinguished those cases by following the vast body of federal case law interpreting ERISA preemption.

For example, *Jaskilka v. Carpenter Technology Corp.*, 757 F.Supp. 175, 178 (D.C. Conn. 1991), the court distinguished *Ingersoll-Rand* as the claims therein "related not merely to pension plans, but the essence of the pension plan itself."

> Although ERISA was intended to have a "sweeping preemptive effect in the employee benefit plan field" (citation omitted), it was not intended to reach state laws that may only indirectly affect the benefit plans. "Quite clearly, there must be a point beyond which ERISA was not designed to reach." (Citation omitted.) . . . In this case, the plan is irrelevant to the cause of action itself. It is not even suggested that this cause of action directly relates to a benefits plan, much less to "the essence of the pension *plan* itself." *Ingersoll-Rand*, 111 S.Ct. at 483 (emphasis in original). The existence of the retirement plan is relevant only to the issue of damages to which plaintiff might be entitled should she prevail on her breach of contract claim. Under these circumstances, the cause of action specified in Count Two of the complaint is not preempted by ERISA.

Jaskilka v. Carpenter Technology Corp., 757 F.Supp. at 178.

In *Tippett v. Old Kent Bank*, 134 FRAUD 159 (D.C. Mich. 1991), the court distinguished *Metropolitan Life v. Taylor* in that it applied where claims asserted were two *enforce* pension benefit rights; it did not apply where plaintiff was merely claiming that loss of pension benefits was one aspect of the damages caused by her wrongful discharge. Furthermore, the *Tippett* court distinguished *Ingersoll-Rand Co. v. McClendon*, *supra*, as follows:

> In *Ingersoll-Rand*, the court held that ERISA preempts a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA. The case is inapplicable to the case before this court because plaintiff's complaint does not allege that she was terminated to prevent her from receiving pension benefits.

Tippett v. Old Kent Bank, 134 F.R.D. at 161. In *Hubbards v. Southwestern Bell*, 759 F.Supp. 567, 569, the court again distinguished *Metropolitan Life v. Taylor*, *supra*, and *Pilot Life v. Dedeaux*, *supra*, stating:

> Rather, plaintiff claims that in violation of a state statute, defendant unlawfully discriminated against her based on her handicap, and that *as a result of such discrimination*, she lost her disability benefits, among other things. (Emphasis original.)

Pilot Life and *Metropolitan Life* were also distinguished in the following opinions, which involved facts and allegations quite similar to, if not identical to, the Plaintiffs' claims herein, to-wit: *Shultz v. National Coalition of Hispanic Mental Health & Human Services Organizations*, 678 F.Supp. 936 (D.D.C. 1988), where the plaintiff alleged that she was discriminatorily terminated from employment; *Cuoco v. NYNEX, Inc.*, 722 F.Supp. 884 (D.C. Mass. 1989), in which plaintiff claimed that defendant had engaged in conduct which wrongfully deprived her of medical, dental and vision care coverage; *Martin v. Pate*, 749 F.Supp. 242 (D.C. Ala. 1990), *affirmed* 934 F.2d 1265 (11th Cir. 1991), where the plaintiff, in addition to seeking recovery of benefits under ERISA claims, also asserted claims for bad faith refusal to pay and for fraud; and *Hartle v.*

Packard Electric, 877 F.2d 354 (5th Cir. 1989), where the plaintiff alleged civil conspiracy to unlawfully terminate his employment, unlawful interference with his contract of employment, and wrongful termination.

State courts follow this logic as well. In *Bricker v. Maytag Co.*, 450 NW.2d 839 (Iowa 1990), the defendant's retirement specialist informed certain employees that they could retire under either the "old contract" or a "new contract" (whichever was better) if they did so on May 31, 1986. In reliance on those representations, the plaintiffs retired on May 31, under the new contract, because it provided substantially higher benefits. However, the following day, the retired employees learned that the new contract did not go into effect until June 1, 1986, and that they were therefore considered retirees under the old contract. The *Bricker* court noted that no pension funds were implicated in the case, and that ERISA involvement was only indirect. Citing *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (D.C. Pa. 1987), the court held that pre-

emption is not mandated in an action brought directly against a company for misrepresentation regarding a pension plan.

> . . . the premise underlying this action was that plaintiff was deceived by the verbal statements made and the actions taken by his employer. That the subject of the deception concerned pension benefits is only incidental and not essential to the plaintiff's cause of action. *Like promises for a raise in salary, a promotion, or the use of tickets to a baseball game, plaintiff's employer promised to provide the plaintiff with certain benefits at some unknown time in the future, upon which plaintiff could reasonably rely, is the essence of the fraud alleged.*

Bricker, 450 NW.2d at 842 (emphasis added).

As further authority for the Plaintiffs' position herein, this Court is referred to *Totton v. New York Life Insurance Co.*, 682 F.Supp. 731 (D.C. Conn. 1987), where the plaintiff's suit alleging that the employer breached employment contracts by wrongful termination was not preempted by ERISA; *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984), where state employment discrimination laws were held as not related to the benefit plan and thus were not preempted by ERISA; *Kelly v.*

IBM, 673 F.Supp. 366 (D.C. Pa. 1983), *affirmed* 746 F.2d 1467 (3d Cir. 1984), in which plaintiff's intentional infliction of emotional distress claims were not preempted by ERISA; *Gould, Inc. v. Pension Benefit Guaranty Corp.*, 589 F.Supp. 164 (D.C. N.Y. 1984), in which plaintiff's contractual claims were not preempted by ERISA; and *Miller v. Lay Trucking Co., Inc.*, 606 F.Supp. 1326 (D.C. Ind. 1985), in which plaintiffs' claims were not preempted by ERISA.

Nor does ERISA preemption apply when, in analyzing a plaintiff's claim, it appears that some of the damages might be shown with reference to a plan. *Klank v. Sears, Roebuck & Co.*, 735 F.Supp. 260 (D.C. Ill. 1990). Other courts acknowledge this distinction as well. See, *Teper v. Park West Galleries, Inc.*, 427 NW.2d 535, 541 (Mich. 1988); *Kanalos v. Graham*, 759 F.Supp. 374 (D.C. Mich. 1991); *Pizlow v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-121 (4th Cir. 1989); *Yageman v. Vista Maria, Sisters of the Good Shepard*, 767 F.Supp. 144, 145 (D.C. Mich. 1991); *Shultz v. National*

Coalition, 678 F.Supp. 936 (D.C. 1988); *Morning Star v. Meijer, Inc.*, 662 F.Supp. 555 (D.C. Mich. 1987); and *Nowac v. Rheem Manufacturing Co.*, 772 F.Supp. 977 (D.C. Tex. 1991).

Yet, in this case, the Washington Supreme Court stated:

> [Plaintiffs] attempt to distinguish *Ingersoll-Rand* by citing cases from lower federal courts. However, they ignore the broad language used by the Supreme Court in *District of Columbia v. Greater Washington Board of Trade*, a 1992 decision concerning ERISA and preemption of state law. Thus, regardless of what lower federal courts may have ruled to avoid the result in *Ingersoll-Rand*, the United States Supreme Court now clearly requires preemption in cases where state courts must inquire into the existence of an ERISA-covered plan in order to determine whether the employer had a pension defeating motive or in cases in state courts where the action "refers to" an ERISA-covered plan. *The result is the same even if the case does not involve administration of a plan nor litigation concerning a plan, plan fiduciaries, employers and beneficiaries.* (Emphasis added.)

Appendix A76-77; *Cutler v. Phillips Petroleum Co.*, 124

Wn.2d at 764-765. This ruling, and specifically the last sentence thereof, sets a dangerous precedent by which employers may defeat any wrongful termination claim which might be brought by an employee who may also have been involved in some ERISA-covered plan.

The case of *District of Columbia v. Greater Washington Board of Trade*, __ U.S. __, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992), dealt specifically with a statutory workers compensation scheme that required employers to provide equivalent health insurance coverage for injured employees eligible for workers compensation benefits. This was clearly a statutory scheme subject to ERISA regulation. Claims for wrongful termination and misrepresentation, as in this case, and from which damages may partially be measured by benefits lost, are clearly distinguishable and do not "relate to" the administration of an ERISA plan. Indeed, the court in *District of Columbia* recognized that "preemption does not occur if the State law has only a 'tenuous, remote, or

peripheral' connection with covered plans." 113 S.Ct. at 583; citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100, 103 S.Ct. 2890, 2901, 77 L.Ed.2d 490 (1983).

The Washington Supreme Court treats the decision of *District of Columbia* as the "last word" in ERISA preemption. Yet, federal court cases which have followed the *District of Columbia* decision continue to adhere to arguments identical to those previously made by the Plaintiffs herein. For example, in *Jacob v. SmithKline Beecham*, 824 F.Supp. 552 (E.D. Pa. 1993), a former employee brought an action in state court for improper termination of continued health and dental benefits which the defendant employer was contractually obligated to provide after plaintiff's termination, only to thereafter cancel the plaintiff's coverage and refuse to reinstate it. Of course, the employer contended that ERISA preempted the plaintiff's contract claim.

The *Jacob* court followed *Angst v. Mac Trucks, Inc.*, 969 F.2d 1530 (3rd Cir. 1992), in which employees claimed

that their employer wrongfully denied them a promised severance package consisting of continuation of certain employee benefits for a period of one year, plus a one-time, lump sum payment at the time of termination.

> The Third Circuit held that the action did not implicate ERISA, despite the fact that it involved a claim to continued benefits, because the employees' action was for benefits under an existing benefit plan. The claim, according to the court, was not related to an ERISA plan under *Ft. Halifax*, since it did not involve "the creation of a new administrative scheme, and [the claim] did not materially alter an existing administrative scheme."

Jacob v. SmithKline Beecham, 824 F.Supp. at 556-557. Thereafter, the *Jacob* court distinguished *District of Columbia* based upon the factual allegations of the respective claims, or "target" of the complaints.

A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a

plan. *United Wire, etc. v. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3rd Cir. 1993), citing *District of Columbia* for the last proposition. Indeed, in *Maldonado v. J.M. Petroleum Corp.*, 827 F.Supp. 1285 (S.D. Tex. 1993), the court failed to even mention the *District of Columbia* decision and held that when a loss of pension benefits is a mere consequence of an employee's firing, regardless of whose assertion is correct, ERISA does not preempt his claim. And, yet another court held:

> Plaintiff's state court petition has nothing to do with the administration of the plan or how benefits are paid under the plan. Instead, plaintiff seeks damages in a wrongful/ retaliatory discharge case in the form of lost benefits, where the discharge itself does not in any manner implicate the plan. In such cases, courts have held that calculation of damages in reference to a plan relates to an ERISA plan in too tangential a manner to warrant preemption.

Roney v. Nationsbank Corp., 799 F.Supp. 670, 673 (N.D. Tex. 1992), citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), in support of that

proposition. Therefore, according to *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 2187, 100 L.Ed.2d 836 (1988), when the claims asserted may be characterized as "run-of-the-mill" state law claims, ERISA preemption does not apply. *Independence HMO, Inc. v. Smith*, 733 F.Supp. 983, 989 (E.D. Pa. 1990).

The court in *Employee Staffing Services, Inc. v. Aubry*, 20 F.3d 1038 (9th Cir. 1994) also distinguished *District of Columbia*. In *District of Columbia*, the city required ERISA plans to provide benefits for employees who were not working during a workers compensation disability period, and therefore found that ERISA preemption applied. However:

> *Greater Washington* explains that the workers' compensation exemption does not limit preemption if the law relates to an ERISA plan. *Id.* at __, 113 S.Ct. at 584. In the case at bar, unlike *Greater Washington*, the state law does not tell employers how to write their ERISA plans. ***The case before us does not involve intrusion on an ERISA plan by a state workers compensation statute***. (Emphasis added.)

Employee Staffing Services, Inc. v. Aubry, 20 F.3d at 1041.

Clearly, the trend in these cases is to look to the specific facts of each case, and not merely to announce that ERISA is an all-encompassing preemption tool.

In *Combined Management v. Superintendent of Bureau of Insurance*, 22 F.3d 1 (1st Cir. 1994), an employer brought an action to enjoin Maine's insurance superintendent from enforcing statutory requirements concerning separate workers' compensation plans. According to *Combined Management*, the *District of Columbia* Opinion dealt only with a law that specifically referred to ERISA-covered benefit plans in order to determine workers' compensation benefits. The *Combined Management* court followed the well-established rule that laws which do not increase costs of a plan, do not interfere with the administration of a plan, or require additional benefits are too "tenuous" and "remote" to warrant preemption.

> The increased cost or administrative burdens imposed by the state law must have some connection to the covered ERISA plan before the preemption analysis can come into play. [Citation omitted.] Where there is no direct

> nexus between a state statute and ERISA plans, no effect on the manner of such plans conducting business or their ability to operate in interstate commerce, statutes have been upheld despite the fact that they may have the indirect ultimate effect of increasing plan costs.

Combined Management v. Superintendent of Bureau of Insurance, 22 F.3d at 7.

Again, the Complaint in this case does not allege that the claimants should have been allowed participation in the Special Separation Program. Rather, when taken as a whole, the Complaint shows that the claimants sued Phillips for misrepresentation and wrongful termination, which cost them all, respectively, general and special damages, including a great amount of lost wages. In *Totton v. New York Life Insurance Co.*, 685 F.Supp. 27, 31 (D.C. Conn. 1987), when faced with a breach of contract claim similar to that at hand, the court granted the plaintiffs' motion for reconsideration, and reversed its earlier ruling that the plaintiffs' contract claim was preempted by ERISA, holding:

> Plaintiffs' claim is that defendant, their employer, broke its promise of continued employment. As a result of that breach, plaintiffs claim, in part, to have suffered the loss of benefits they would have accrued had they not been terminated. Recovery of those benefits will not affect the administration of the benefits plan, nor will payment be made by the plan fiduciary....The connection to the plan is too attenuated to bring the claim within the preemptive provision of ERISA.

As other courts continue to follow these clear preemption guidelines, in employment disputes, the decision of the Washington Supreme Court stands alone. Recently, in *Forbus v. Sears, Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), a substantially similar set of facts lead that Court to reverse the trial court and deny ERISA preemption. In *Forbus*, the plaintiffs retired from their jobs at a Sears warehouse facility, after a company representative told them at meetings that the company planned to shut down that facility, that their jobs would be eliminated, and thus their employment would be terminated as of December 31, 1989. Sears presented the plaintiffs with a "Retirement Incentive Package" and advised

them that they had no choice but to elect to participate and "involuntarily" retire, even though the plaintiffs expressed their desire to continue employment. After taking retirement, in January 1990 the plaintiffs learned that the warehouse was reorganized, and they requested their jobs back. When told their jobs were no longer available, the plaintiffs learned that their jobs had not been eliminated, but rather had been filled by younger employees. The plaintiffs sued, alleging fraud.

The *Forbus* Court easily distinguished *Ingersoll-Rand v. McClendon, supra,* noting that the plaintiff there sought damages due to the loss of his *pension benefits plan. Forbus,* 30 F.3d at 1406. In contrast, the *Forbus* Court held, the plaintiffs' claims presented centered on Sears' alleged fraud concerning the elimination of the plaintiffs' jobs. Distinguishing *McClendon,* the Court held:

> Obviously, the present case is distinguishable in that Sears' alleged misrepresentations did not involve a benefit plan -- it involved the very existence of the plaintiffs' jobs. Furthermore, the mere fact that the plaintiffs' damages may

> be affected by a calculation of pension benefits is not sufficient to warrant preemption. (Citation omitted).

Forbus v. Sears, Roebuck & Co., 30 F.3d at 1406-1407. That decision, entered only a few weeks before the decision at issue here, is squarely at odds with the Washington Supreme Court rationale concerning the sweeping effect of ERISA in wrongful employment termination cases. Other recent cases distinguishing *Ingersoll-Rand v. McClendon, supra,* on the same grounds, include *Zewe v. Law Firm Of Adams & Reese,* 852 F. Supp. 516 (D.C. La. 1993)(retaliatory discharge case for "whistleblowing"); and *Jorgensen v. Prudential Ins. Co.*, 852 F.Supp. 255 (D.C.N.J. 1994)(retaliatory discharge for questioning the valuation of ERISA-covered accounts).

> The *McClendon* rationale is not applicable to the case at bar. Central to the *McClendon* holding was the fact that ***the state law at issue made specific reference to benefit plans***. . . . (Citation omitted). Unlike the Texas cause of action in *McClendon*, the North Carolina causes of action asserted here, fraud, constructive fraud, and negligent misrepresentation are general laws that function

> irrespective of the existence of an ERISA plan. It is true, factually, that resolution of Plaintiffs' claims may require reference to the HMA Plan. However, liability is not premised on conditions in or a construction of the plan. The possibility that certain undisputed facts will be established by reference to the plan does not bring these common law claims within the ERISA pre-emption provision. *The existence of the Plan is not a critical factor to establishing liability because the same causes of action would exist if the Plan had never come into existence or was merely a fraudulent scheme.*

Smith v. Cohen Ben. Group, Inc., 851 F.Supp. 210, 213 (D.C.N.C. 1993). (Emphasis added). The same logic applies here.

These cases cannot be ignored. Clearly, the federal courts are not willing to grant an all-inclusive preemptive power to ERISA. Rather, the federal courts continue to look to the Congressional intent of ERISA, 29 U.S.C. § 1001(a), which states:

> ...it is desirable...that...safeguards be provided with respect to the establishment, operation, and administration of such plans;...that minimum standards be provided assuring the equitable character of such plans and their

financial soundness.

Federal preemption applies when a State law does "major damage" to "clear and substantial" federal interests or "sufficiently injures the objectives of the federal program to require non-recognition." *Marriage of Myers*, 54 Wn.App. 233, 236, 773 P.2d 118 (1989). In cases where federal preemption is found, the federal law will supersede a State law only to the extent necessary to protect the achievement of the aims of the federal enactment. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127, 38 L.Ed.2d 348, 94 S.Ct. 383 (1973), as cited in *State v. Williams*, 94 Wn.2d 531, 538, 617 P.2d 1012 (1980).

A finding that Congress intended to preempt State regulation in a given field must be based on an unambiguous congressional mandate to that effect. *Pioneer First Federal v. Pioneer National Bank*, 98 Wn.2d 853, 659 P.2d 481 (1983). Although relevant, a detailed statutory scheme may reflect the nature and complexity of the subject rather than an intent to

preempt State law. Id. In this case, a hybrid of these two principles is presented. While Congress did intend to preempt State laws regarding the administration of employee benefit plans, or, for that matter, common law suits directed to the plan, its trustees or fiduciaries, the Congress clearly did not intend to usurp States' rights regarding *any* lawsuit, under common law theories, which may collaterally touch an ERISA plan. Rather, if Congress had intended the sweeping preemption advanced by Phillips and adopted by the Washington State Supreme Court, it would have specifically so stated.

Washington recognizes that there is a strong presumption against finding preemption. *Labor & Industries v. Common Carriers,* 111 Wn.2d 586, 762 P.2d 348 (1988). Yet, the Opinion of the Washington Supreme Court in thi case, under the facts presented, shows a willingness to allow preemption under any circumstances in which an ERISA plan may be referenced. It becomes clear that the Washington Court relied only upon the decision in *District of Columbia v.*

Greater Washington Board of Trade, supra, to announce this sweeping preemption rule, ignoring literally dozens of cases cited by the Plaintiffs which distinguish both the *Ingersoll-Rand* and *Greater Washington* decisions.

Federal statutes are interpreted pursuant to federal law. *Rodriguez v. Travelers Insurance*, 54 Wn.App. 725, 775 P.2d 973 (1989). Washington has recognized that, in actions regarding ERISA, federal substantive law controls, and issues are decided according to the weight of federal authority. *Helper v. CBS, Inc.*, 39 Wn.App. 838, 844, 696 P.2d 596 (1985). Yet, in this case, the Washington Supreme Court merely brushed aside dozens of federal cases which are factually similar, if not virtually identical, to the case at bar, and announced a rule that grants *carte blanche* ERISA preemption, deleting the availability of a local forum to its residents in wrongful termination cases.

D. The Issue Of Whether The Plaintiffs Were "Participants Or Beneficiaries" Is Critical To An Analysis Of ERISA Preemption

Again, at 124 Wn.2d 756, , the Washington Court stated:

> Whether [Plaintiffs] would have standing under ERISA to bring their claims in federal court as "participants" in the special program is of little significance on the issue of preemption.

Appendix A77-78. To the contrary, the status of the Plaintiffs as "participants" or "beneficiaries" of a plan is essential to a finding of ERISA preemption.

Indeed, in its analysis, the Washington Supreme Court cited the ERISA civil enforcement provision, 29 U.S.C. § 1132. That section provides, in relevant part:

> (a) A civil action may be brought-- ...
>
> (1) by a *participant*...
>
> (B) to recover benefits due to him under the term of his plan...
>
> (3) by a *participant*... (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

> any provisions of this subchapter or the terms of the plan....

Throughout its Opinion, the Washington Court pursued a preemption analysis under the case of *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 112 L.Ed.2d 474, 111 S.Ct. 478 (1990), which deals with both 29 U.S.C. § 1144 and 29 U.S.C. § 1132, only then to summarily discard the importance of a determination of whether these Respondents were "participants" in any program.

That very issue was presented in *Jacob v. SmithKline Beecham*, 824 F.Supp. 552 (E.D. Pa. 1993). There, the court was faced with the question of whether the plaintiff's state law claims should be "recharacterized" as ERISA claims, and held:

> In the ERISA context, only claims that fall within the broad scope of ERISA's civil enforcement provision are completely preempted. (Citations omitted.)
>
> It is apparent that this section [29 U.S.C. § 1132(a)] requires both the existence of an ERISA "participant or beneficiary" and a claim under an ERISA "plan" before a civil enforcement action can lie under Section

> 1132(a)(1)(B). Accordingly, for complete preemption to apply in this case, SmithKline must show that Jacob's claim is one brought by a participant under an ERISA plan.

Jacob v. SmithKline Beecham, 824 F.Supp. at 556. See also, *Kelly v. Blue Cross*, 814 F.Supp. 220, 223 (D.R.I. 1993). Very clearly, the issue of whether a claimant is a "participant or beneficiary" may not merely be swept aside in an analysis of ERISA preemption; rather, the issue is critical. Federal courts have no difficulty following this rule.

> To fall within the complete preemption doctrine, an action must satisfy dual requirements: the state cause of action must be preempted by ERISA, and the plaintiff must have a right of action under the civil enforcement mechanisms of ERISA 502(a), 29 USC §1132(a). [Citations omitted]. Under ERISA, the class of plaintiffs given a right of action pursuant to §502(a) are participants, beneficiaries and fiduciaries of ERISA regulated plans, and the Secretary of Labor.

Albradco, Inc. v. Bevona, 788 F.Supp. 786, 790 (S.D. N.Y. 1992). Stated more succinctly, another court found:

> FNB [claimant] cannot bring its action under ERISA because it lacks standing to sue under

> ERISA §502 [29 U.S.C. §1132], ERISA's exclusive civil enforcement mechanism...Hence, preemption would bar FNB's state cause of action outside of ERISA and leave it without a cause of action within ERISA. The court concludes that because this claim does not fall within the scope of ERISA §502, it is not preempted by ERISA §514 [29 U.S.C. §1144].

Matter of Columbia Gas System, Inc., 164 B.R. 883, 888 (Bkrtcy. Del. 1994). Clearly, the issue of preemption requires that two-step analysis, and not merely a recitation of "preemption" under § 1144.

Both the trial court and the Court of Appeals adopted the Cutler Plaintiffs' argument concerning their respective status as "participants or beneficiaries" under an *existing* ERISA plan. Quite clearly, and has been admitted by Phillips in its Answer to Plaintiffs' Complaint, these Cutler claimants were not employees of Phillips at the time the "Special Separation Program" was announced, and therefore were not "participants or beneficiaries" under that plan. ERISA preemption fails. Of critical import is the fact that these Plaintiffs did

not sue Phillips to gain *inclusion* in that plan.

A civil action may be brought under ERISA only by a "plan participant," "beneficiary," "fiduciary," or by the Secretary of Labor. 29 U.S.C. § 1132(a)(2); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). This is both a standing and a subject matter jurisdictional requirement. Id. The fact that these Plaintiffs were not "beneficiaries or participants" cannot be dismissed out of hand, and is indeed critical to a determination of ERISA preemption. In this respect, the Washington State Supreme Court erred.

In *Stanton*, the plaintiff filed an action alleging misrepresentation, concealment of material facts, and breach of an implied promise to allow him the benefits of any changes made in the Gulf Oil retirement plan. As stated earlier, the plaintiff in that case had chosen early retirement, not knowing that Gulf Oil had approved a new retirement plan for those who retired after plaintiff's effective retirement date. The *Stanton* court found that the protection of ERISA is tied to

current participants only, that the plaintiff was not a current participant in any future benefit plan announced *after* his retirement, and that therefore summary judgment was proper as the plaintiff could not, pursuant to 29 U.S.C. § 1132, bring an action under ERISA. This is precisely the predicament faced by the Plaintiffs in this case, and which the trial court and Court of Appeals noted in determining that ERISA preemption did not apply.

A like case is *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), in which the plaintiffs were 101 former salaried, non-union employees of Gulf Oil at its refinery in Santa Fe Springs, California. Gulf sold that refinery to Thrifty Oil Corporation on July 31, 1983. Gulf arranged with Thrifty for Thrifty to hire the former Gulf employees who had worked at the refinery. After the transfer, the plaintiffs sued Gulf Oil, alleging breach of an oral employment concerning severance pay, that Gulf secretly negotiated their future employment with Thrifty and privately agreed with Thrifty to coerce and deceive

the plaintiffs into accepting employment on less favorable terms, for breach of the duty to act fairly and in good faith, and for fraud and breach of fiduciary duty. The trial court held that each of those plaintiff's common law claims was preempted by ERISA. That ruling was reversed, since ERISA did not preempt the plaintiffs' claims alleging the loss of benefits the plaintiffs would have accumulated while employed by Thrifty were it not for Gulf Oil's alleged improper negotiation of the terms of their employment with Thrifty. Specifically, that court held that ERISA does not preempt the plaintiffs' claims that they lost both severance and other benefits, which the court referred to as "prospective benefits." Id., at 1505.

The *Scott* court explained that a claim for prospective benefits, like the Plaintiffs in this case, does not allege denial of benefits under a benefit plan; rather, it alleges that Gulf's tortious actions prevented the existence of such a plan in plaintiffs' employment with Thrifty. It was not the administration of the plan that the plaintiffs attacked, but rather it was the

conduct of their former employer that gave rise to the claim. Id. This is exactly the factual scenario of this case, as these Plaintiffs have alleged that Phillips encouraged their transfer and sale to CEPEX when it knew or should have known of CEPEX's precarious financial health.

The *Scott* court relied upon *Freeman v. Jacques Orthopedic*, 721 F.2d 654 (9th Cir. 1983), in which the plaintiff brought an ERISA action for an accounting and distribution of benefits claimed owed under the defendant's pension and profit sharing plan. The plaintiff's theory was that he was misled by the defendant as to the cost of his participation in the plan, thereby foregoing its benefit. However, the court again noted that, to bring a suit under ERISA, one must be a *participant* in or a *beneficiary* of a plan. Id., at 655.

As is the case here, the *Freeman* court found that the plaintiff was not, at the time of filing the action, nor at the time of trial, an employee of Jacques Orthopedic. That court held

that there was nothing that plaintiff could do to make himself eligible for benefits, since he was no longer employed by that defendant. The thrust of the plaintiff's claims was that he did not participate in the plan because he was misled as to the cost of participation. Therefore, the *Freeman* court held that, at most, the damages that could be awarded to Freeman were those damages caused by the alleged fraud. Id., at 656. However, since the claim was not brought by a *participant* in the plan or by a *current employee*, the Court of Appeals found that the district court lacked jurisdiction under ERISA.

The *Scott* and *Freeman* decisions were relied upon in *Deller v. Portland General Electric Co.*, 734 F.Supp. 916 (D.C. Or. 1990). There, the plaintiffs voluntarily elected to leave their employ with PGE in 1987, when their jobs were eliminated by a reduction in force program. However, PGE's pension plan was amended effective January 1, 1988, with enhanced pension benefits for those employees who were on the payroll as of that date. The plaintiffs alleged that PGE

purposefully delayed the implementation of the amended plan until after they were terminated in order to ensure that they would not receive the enhanced pension benefits, which was thus a breach of the duty of good faith and fair dealing, as well as negligence. While the Cutler Plaintiffs have not alleged that Phillips possessed a similar motive, it is instructive that the *Deller* court held:

> The gist of plaintiffs' claims is that plaintiffs were prevented from being participants of the plan, and therefore they were prevented from being eligible for enhanced benefits, by PGE's misrepresentations and breach of the covenants of good faith. As the 9th Circuit recognized in *Scott, it is not the label attached to a state law claim which determines whether it is preempted, but whether the state law claim is, in essence, a claim for ERISA benefits.*

Deller v. Portland General Electric Co., 734 F.Supp. at 918 (emphasis added). Those plaintiffs' state law claims were not preempted by ERISA. Id. In its companion case, the *Deller* court noted that ERISA standing is absent where an employee was terminated before the adoption of a change in benefits.

Deller v. Portland General Electric Co., 727 F.Supp. 1369, 1371 (D.C. Or. 1989). See, also, *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (D.C. Cal. 1988).

These rules have been universally applied. In *Bell v. Amcast Industrial Corp.*, 606 F.Supp. 486 (D.C. Ohio 1985), the plaintiffs were asked to continue working at the defendant's facility until it ceased production at the end of April, 1984. In exchange, the defendant agreed to maintain the severance policy it had instituted in 1979. However, a week before the shut-down, the plaintiffs were informed that they would receive only supplemental employment benefits instead of the aforementioned severance policy. Plaintiffs sued in state court, claiming breach of contract, promissory estoppel, and fraud, and the defendant removed the case to the U.S. District Court claiming the suit was covered by ERISA. In remanding the case to the state court, the District Court stated:

> Further, the complaint does not show that the relief requested necessarily depends on any federal law. No mention is made of federal

> law, *much less an alleged ERISA violation in the administration, funding, or disbursement of the severance policy.* The policy is represented as defendant's consideration in a contract entered into between it and the plaintiffs. *The dispute centers around the oral agreement.* The way the complaint reads, *plaintiffs may concede defendant's full compliance with ERISA and still maintain its action.* The policies covered by or compliance with ERISA is irrelevant to the central issues in the case--whether defendant breached a contract negotiated in April, 1984, committed fraud on that date, or acted in such a way as to justify application of promissorial estoppel.

Bell v. Amcast Industrial Corp., 607 F.Supp. at 488 (emphasis added). Here, the Cutler Plaintiffs' claims could stand regardless of the existence of any benefits plan *to which they were participants or beneficiaries.* ERISA does not preempt state law claims that do not effect the relations among the principal ERISA entities: the employer, the plan fiduciaries, the plan, and the beneficiaries. *Gibson v. Wyatt Cafeterias, Inc.*, 782 F.Supp. 331, 334 (D.C. Tex. 1992). In this case, neither the plan, plan fiduciaries, nor any "beneficiaries" are implicated. See, also, *Teagardner v. Republic-Franklin, Inc.*, 909 F.2d

947 (6th Cir. 1990).

Other cases substantially similar to that at issue uniformly follow these rules. In *Klank v. Sears, Roebuck & Co.*, 735 F.Supp. 260 (D.C. Ill. 1990), the plaintiff elected to voluntarily resign from Sears employment after Sears announced it would be closing its catalog unit. Sears failed to inform the plaintiff of the imminent announcement that a special severance pay package for those employees would be available to them the very next day. Plaintiff sued, alleging fraud, negligent misrepresentation and breach of confidential relationship. Sears contended that the claims were covered under ERISA. The reviewing court held:

> What Sears' thoughtful presentation has missed, however, is the fact that Klank is *not* suing as a beneficiary or participant under an employment benefit plan--he does *not* come "within the scope" of ERISA § 1132(a)(1)(B). Instead, he complains that he was misled by Sears' non-disclosure of a future (though then non-existent) employee benefit plan. To be sure, Klank's measure of *damages* if his lawsuit were to succeed would be ascertained by reference to that later-announced plan, but that

> does not at all equate with bringing him within the scope of the statutory section. Suit as a *non*-beneficiary or a *non*-participant does not translate by some slight of hand into suit as a beneficiary or participant.

Klank, 735 F.Supp. at 263 (emphasis original). See, also, *Yancy v. American Petrofina, Inc.*, 597 F.Supp. 490 (D.C. Tex. 1984) *affirmed* 768 F.2d 707 (5th Cir. 1985), and *Bricker v. Maytag Co.*, 450 NW.2d 839 (Iowa 1990).

This substantial precedent was ignored by the Washington Supreme Court in its analysis, which centered solely on a broadly erroneous interpretation of the "relates to" language of ERISA, involving claims against the plan, its administration or fiduciaries. The Cutler Plaintiffs respectfully submit that this erroneous application of federal preemption under ERISA, and the Supremacy Clause of the United States Constitution, mandate review and reversal by this Court.

V. REASONS FOR GRANTING PETITION

This erroneous decision clearly stands alone. To allow the Washington State Supreme Court decision in this case to

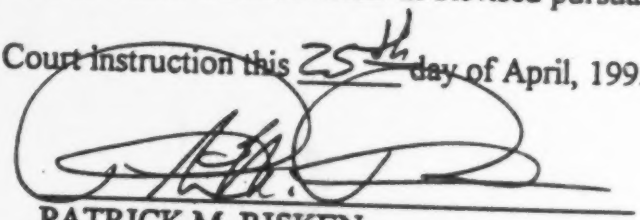
remain unchanged would provide a new precedent regarding ERISA preemption, creating a new branch of caselaw totally at odds with United States Supreme Court cases defining the boundaries of ERISA preemption, and the vast majority of Federal Court cases which have addressed ERISA preemption in similar or identical situations. It would cement an overly broad interpretation of United States Supreme Court cases which clearly were not meant to be so expansively applied. This decision, as it now stands, flies in the face of the vast majority of Federal cases which have consistently denied ERISA preemption in wrongful employment termination lawsuits. Indeed, the current decision eliminates the standing requirement essential to ERISA-based actions.

ERISA serves a purpose of uniformity in pension and benefit plan administration; it was not meant to eliminate common law causes of action and deny citizens of the various States a forum to redress wrongful conduct by their employers in the work setting, which conduct may only peripherally

involve an ERISA-covered plan. It is essential that this Court correct the Washington State Supreme Court's mis-application of ERISA preemption, to draw this case back into line with the body of Federal caselaw developed and applied in this critical area of employer/employee relations.

Based upon the foregoing arguments and authorities, The Cutler Plaintiffs herein respectfully submit that a Writ of Certiorari should issue in this case, allowing full review by this Court of the erroneous decision currently in place in the case *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 216 (1994).

RESPECTFULLY SUBMITTED as Revised pursuant to Supreme Court Instruction this 25th day of April, 1995.



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APPENDIX

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF SPOKANE

ALVIN B. CUTLER, et al,	)	
	)	
Plaintiff,	)	No. 89-2-00798-8
v.	)	
	)	Memorandum Opinion
PHILLIPS PETROLEUM COMPANY,	)	
	)	
	)	
Defendant.	)	

This matter comes before the Court upon the Defendant's Motion to Dismiss, pursuant to CR12(b)(6) and 12(b)(1), all eight causes of action, or in the alternative to grant summary judgment in favor of the defendants on all eight causes of action. The matter was argued before this Court on September 6, 1991, with the plaintiff being represented by Mr. Pat Riskin [sic] of Feltman, Gebhardt, Eymann & Jones, P.S., and the defendant being represented by Mr. Richard McWilliams of Paine, Hamblen, Coffin, Brooke and Miller.

The plaintiffs have alleged eight separate causes of action. They are as follows: (1) Employment benefits unlawfully withheld, (2) negligence, (3) breach of contract, (4) fraud, (5) negligent misrepresentation, (6) tort of outrage, (7) breach of fiduciary duty, and (8) age discrimination (alleging both state law and federal law violations).

There are 12 plaintiffs, all of them being married except one, and all of those who are married having joined their spouses or their marital community.

On March 12, 1991, the plaintiffs filed their First Amended Complaint for Damages in this case, which includes the eight causes of action previously listed. The Amended Complaint incorporated the claims of the plaintiffs in Jantzen et al v. Phillips Petroleum Company [sic], Benton County Superior Court Cause no. 88-2-00556-4, which case was transferred to Spokane County Superior Court by Order dated June 19. 1990, and was consolidated with this case by order of the Court dated October 4, 1990.

The Complaint alleges that prior to March 1, 1986, all of the plaintiffs had been employees of the defendant, Phillips Petroleum Company, and had worked in the defendant's fertilizer and chemical divisions in Finley and Spokane, Washington.

On February 28th the defendants sold its interest in American Fertilizer and Chemical Company to Cepex, Inc. The Complaint further alleges that as a result of certain assurances having been made to them, all except plaintiff Jantzen consented to their transfer of employment to Cepex and even though plaintiff Jantzen did request a transfer, his request was denied and he was also transferred to Cepex.

The Complaint further alleges the defendant represented to the plaintiffs that the defendant "had protected each of them by contracting or otherwise agreeing with Cepex concerning salary and benefits, and assured the plaintiffs that any Phillips' salary and benefits accrued by the plaintiffs with Phillips would be intact without reduction for

a minimum of two (2) years after the date of sale to Cepex without reduction or elimination", and further alleged that; "....the sale of the fertilizer assets would be to a company with the financial ability and commitment to run the business for a substantial period of time."

Subsequently, in December of 1986, each of the plaintiffs was laid off or otherwise separated from gainful employment with Cepex.

In the meantime, on April 13, 1986, defendant announced a "special separation program", which included enhanced retirement benefits, severance pay, out-placement and housing assistance, and enhanced medical and life insurance benefits. Those enhanced benefits were provided to anyone who was a Phillips' employee who chose to separate from the defendant's employment during a window period from April 3, 1986 through July 1, 1986. It is alleged that several of the plaintiffs attempted to take advantage of the "special separation program" but were denied on the

basis that they were not "employees" as of April 3, 1986.

The primary thrust of the argument in support of dismissal of the eight causes of actions is that the plaintiffs' state law causes of actions are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), and further that the seventh cause of action (breach of fiduciary duty) is within the exclusive jurisdiction of the Federal courts and defendants also question whether the plaintiffs have complied with the Federal Age Discrimination Act so as to support their present claim under cause of action number VIII (age discrimination).

As to the eighth cause of action, it is the Court's conclusion that there are sufficient questions of fact raised by the pleadings to require denial of the Motion for Dismissal or Summary Judgment. According to the supplemental affidavit of Patrick M. Riskin [sic], this claim applies to plaintiffs Al Cutler, Billy Dias, Marvin Paul, Larry Gust and Kenneth Jantzen. The affidavit of Mr. Riskin [sic] and the attached

documents indicate that certain documentation was submitted to EEOC, thereby providing the basis for proceeding with cause of action number VIII.

The defendant contends that the remainder of the causes of actions alleged are in fact, claims which should have been brought under ERISA and therefore should now be dismissed. Defendant points out that plaintiff's 7th cause of action (breach of fiduciary duty) specifically references 29 USC Section 1101 et seq., 29 USC Section 1104, Section 1105, Section 1109, Section 1132 and Section 1140. The case law on this point seems to be very clear and in fact, counsel for the plaintiff acknowledged that breach of fiduciary duty claims brought under ERISA are within the exclusive jurisdiction of the Federal Courts. The question then is whether or not cause of action number VII is drafted as to exclude any state cause of action, or whether, as suggested in plaintiffs' response, that any reference to 29 USC, Section 1101 et seq., contained in Paragraphs V and

XXIII of the Amended Complaint may be properly stricken and thereby "streamlining this case to determination of common law and state statutory claims only."

As to the question of whether or not causes of action one through seven are preempted by ERISA, there is no question but that Congress intended to ensure that all employee benefit plans would be uniformly implemented and administered and that "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan...." Shaw v. Dalta [sic] Airlines, Inc., 463 US 85, 77 Law Ed2d 490, 1983. The stumbling block in the analysis, however, is determining the meaning of "relates to".

Our Court of Appeals in the case of Boutillier v. Libby, McNeill and Libby, 42 Wn. App. 699, 713 P2d 1110, cited with approval from Shaw v. Delta Airlines, Inc., supra, at page 98, the following:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase if it has a connection with or reference to such plan....we must give affect to this plain language unless there is good reason to believe congress intended the language to have some more restrictive meaning."

In Boutillier, the court continued on page 710 as follows:

> "Since the rendition of these opinions, the weight of case authority has held that state law claims which even indirectly impact pension plans are preempted by ERISA. Here, application of Washington contract and estoppel law would indirectly regulate administrative decisions made with respect to the processing of pension plan claims. Moreover, application of Washington law also would provide alternative enforcement mechanisms not provided by ERISA. Therefore, we conclude plaintiffs' state law claims 'relate to' the Libby employee benefit plans and are preempted."

It becomes apparent, therefore, that the interpretation of ERISA in regard to preemption is to be liberally construed. However, that still requires the Court to determine whether or not specific facts do in fact "relate to" ERISA and are not merely allegations of state law which might only

periferally [sic] impact ERISA or be impacted by ERISA.

The plaintiffs contend that their causes of action result from the sale of the business and the plaintiffs to Cepex and the resulting damage to them as opposed to any claim for wrongful administration of a retirement benefit plan. They also assert that ERISA does not apply because they were not "participants" or "beneficiaries" of the special separation program of April 3, 1987. A brief, but succint [sic] explanation of ERISA is found in the case of Scott v. Gulf Oil Corporation, 754 Fed2d 1499 (1985) at page 1501:

Therein the court stated:

> "ERISA is a remedial statute designed to protect the interests of employee's pension and welfare plans, (omit citation) and to protect employers from conflicting and inconsistent state and local regulations of such plans, (omit citations). The former purpose is achieved through requirements for reporting, disclosure, participation rights, vesting of rights to benefits, funding, fiduciary responsibilities, and claims procedures. (Omit citations.) The latter purpose is achieved through the preemption, with a few exceptions not relevant here, of all state laws

relating to the employee pension and welfare benefit plans."

"ERISA creates federal causes of action for recovery of benefits due under pension and welfare plans, see 29 U.S.C. Section 1132 (a)(l)(b), and for breach of fiduciary duty by plan fiduciaries, see id Sections 1109, 1132 (a)(2). In appropriate circumstances, extra contractual and punitive damages may be obtained under the latter cause of action (citations omitted).

"ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor law, to fashion a body of federal common law to govern ERISA suits. (Citations omitted).

"ERISAs preemption clause declares that ERISA 'shall supercede [sic] any and all state laws in so far as they may now or hereafter relate to any employee benefit plan....'. 29 U.S.C. Section 1114(a)(1982). The preemption extends to the state common law causes of action as well as regulatory laws. (citation omitted)."

Defendant contends that the case of Ingersol-Rand Company v. McClendon, 498 U.S. , 112 Law Ed2d 474,

111 S. Ct. 478 (1990) is dispositive of this action. The court stated on page 483:

> "We must decide whether these provisions either singly or in combination, preempt the cause of action at issue in this case. 'The question whether a certain state action is pre-empted by federal law is one of congressional intent.' 'The purpose of congress is the ultimate touchstone.'" Alice-Chalmers Corporation v. Leuck, 471 US 202, 208, 85 Law Ed2d 206, 105 S. Ct. 1904 (1985) (additional quotes omitted). To discern congress' intent we examined the explicit statutory language and the structure and purpose of the statute. (citations omitted)..."

The court in the Ingersol-Rand case overruled a five to four decision of the Supreme Court of the State of Texas.

The plaintiffs assert that this present cause of action is similar and analagous [sic] to the case of Jaskilka v. Carpenter Technology Corporation, 757 F. Supp. 174 (D.C. Conn. 1991). In that case the court distinguished the Ingersol-Rand case and stated at page 178 the following:

> "....Although ERISA was intended to have a 'sweeping preemptive affect in the employee benefit plan field; (citations omitted), it was

> not intended to reach state laws that may only indirectly affect the benefit plans. 'Quite clearly, there must be a point beyond which ERISA was designed not to reach.' Totten v. New York Life Ins. Co., 685 F. Supp. 27, 30 (D. CONN. 1987) (Plaintiff's claim for lost benefits resulting from employer breach of employment contract is not preempted because recovery would not affect administration, financial status, or obligations of plan). In this case, the plan is irrelevant to the cause of action itself. It is not even suggested that this cause of action directly relates to a benefits plan, much less to 'the essence of the pension plan itself.' Ingersol-Rand , 111 S. Ct. at 483. The existence of a retirement plan is relevant only to the issue of damages to which plaintiff might be entitled should she prevail on her breach of contract claim..."

Again, the issue before this Court is whether or not the causes of action in this case "relate" to an employee benefit plan. In reviewing the Complaint, it appears obvious that the seventh cause of action, "breach of fiduciary duty" as to plaintiffs Cutler, Carrieres, Dias, Gust, Jantzen and Paul is related. It reads as follows:

> "Based upon the foregoing acts and/or ommissions [sic] of the defendant Phillips, defendant Phillips has unlawfully interfered

with plaintiff's rights as participants in the 'special separation program' of April 3, 1986 which benefits the plaintiffs are entitled to recover, including costs and reasonable attorney's fees in amounts to be proved at the time of trial. 29 U.S.C. Section 1101, et seq; 29 U.S.C. Section 1104, Section 1005, Section 1009, Section 1132 and Section 1140."

As stated previously an ERISA action for breach of fiduciary duty is exclusively within the jurisdiction of the Federal court and therefore cause of action VII will be dismissed.

The following addresses causes of action I through VI specifically. The first cause of action alleges that "benefits" were unlawfully withheld from all of the plaintiffs. If then relies upon RCW 49.46.010, 49.52.050 and 49.52.070. Rcw [sic] 49.46 is entitled the Minimum Wage Act. RCW 49.46.010 sets forth the definitions for the Act and RCW 49.52.050 and .070 deal specifically with the withholding of wages or requiring rebates of wages and the penalties imposed for that. Since the first cause of action refers only to

"benefits" and makes no reference to "wages" as one of those benefits, and further there is no specific claim for such wage denial, it is the opinion of the Court that it should be dismissed as a matter of law pursuant to CR 12(b)(6).

As to causes of action II through VI it appears to the Court that a significant case is the case of Klank v. Sears-Roebuck & Co., 735 F. Supp. 260 (N.D. ILL 1990). In that case the plaintiff, after learning that a catalog unit at his store was to be closed, voluntarily retired. This was done after talking to his supervisor and a representative from the personnel department and the store manager. They did not tell him of an imminent announcement of a special severance [sic] pay package which would have been available to him if he had stayed on the job for just a couple of more days.

He filed a state court lawsuit and alleged fraud, negligent misrepresentation and breach of confidential relationship. The defendant asserted that the claim inherently implicated ERISA because the benefits he lost were provided by

an "employee benefit plan". The defendant had the action removed to Federal court. The Federal District Court Judge determined that ERISA did not preempt the employees' state law claims and granted a motion of remand. The judge in that matter refered [sic] to several cases including the case of Pizlo v. Bethlehem Steel Corporation, 884 F2d 116, 120-21 (4th Cir. 1989). In concluding the Klank case the court stated:

> "Klank's case is not a perfect match to that in Pizlo. But the operative concept in the two cases is identical: The distinction (1) claiming as an actual beneficiary or participant under an employee benefit plan (2) claiming as a non-beneficiary or a non-participant whose damages might be measured by the plans formula. No philosopher's stone transmutes Klank's state law claims into Federal question claims for removal purposes."

Although the Klank case was decided prior to the Ingersol case, when it is analyzed in light of Ingersol and in light of Jaskilka the distinction between plaintiff's and defendant's arguments in this case seem to become clear.

In this case the plaintiffs are not asking for enforcement of any benefits which may have been available to them under the revised retirement plan or other benefit plan.

They are, rather, alleging that the defendants breached a contract or committed various torts which resulted in damage to them. It is true that some of the damages may be measured by the benefit plan which the defendant had, however, it is this Court's opinion that is not the "essence" of the complaint and therefore the Motion to Dismiss Causes of Action II through VI will be denied.

DATED THIS 20th DAY OF DECEMBER, 1991.

s/R.J. Schroeder
JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; and MARVIN PAUL and JANICE PAUL, a marital community; RICHARD A. DAVIS and his marital community; FRED LINDBERG and his marital community; JERRY KOONTZ and his marital community; DAVID L. HOFFARTH and his marital community; RICHARD G. ALLEN and his marital community; and SUSAN R. HOOVER and ALLEN V. HOOVER, a marital community,	) No. 12271-9-III) Division Three
Respondents,	
v.	
PHILLIPS PETROLEUM COMPANY, a foreign corporation,	) Filed OCT 21 1993
Appellant.	

SWEENEY, A.C.J.--Twelve former employees of Phillips Petroleum Company brought suit against Phillips alleging one Employee Retirement Income Security Act of 1974 (ERISA) cause of action, six state law causes of action, and a claim of age discrimination. The court dismissed two causes of action preempted by ERISA, but denied Phillips' motion to dismiss the age discrimination claim and the remaining five state law causes of action. Phillips appeals the court's decision denying its motion to dismiss the state law causes of action. We affirm.

FACTUAL BACKGROUND

Prior to December 1985, respondents were employees of Phillips Petroleum Company. In December 1985, all worked for a subsidiary of Phillips in either Spokane or Finley. The Spokane employees had worked for Phillips for an average of 26 years (range 19 to 31 years).

In December 1985, Phillips was faced with a threatened hostile takeover. It decided to liquidate debt by selling assets, including the plants in Spokane and Finley, to Cepex American.

The employees' complaint alleges that Phillips' management told the employees that Phillips had protected their salary and benefits by contract with Cepex. They were assured that any accrued Phillips' salary and benefits would not be reduced for a minimum of 2 years following the sale. They were also assured the sale would be made to a company with the financial ability and commitment to run the plants for a substantial period of time.

Phillips sold the assets to Cepex on March 1, 1986. One employee requested a transfer within Phillips; the request was denied. The other employees acquiesced in their transfer to Cepex. It soon became apparent that Cepex would not continue operation of the plants.

On April 3, 1986, Phillips announced a "Special Separation Program" (SSP). The program included enhanced retirement benefits, severance pay, outplacement and housing assistance, and medical and life insurance benefits. Eligibility, nowever, was limited to those who terminated their employment between April 3 and July 1, 1986. The employees were denied participation in the SSP because they were not Phillips' employees on April 3, 1986. Higher ranking Phillips' employees apparently knew of the SSP prior to March 1, 1986; they continued to work at Phillips and were therefore eligible for the program.

On or about December 26, 1986, the employees were laid off or otherwise separated from Cepex.

PROCEDURAL HISTORY

Six employees brought suit in Spokane County Superior Court on February 28, 1989. Six Finley employees filed a separate action against Phillips in Benton County. The Benton County cause was transferred to Spokane County

and consolidated with this action.

The causes of action in the first amended complaint included: (1) benefits unlawfully withheld based upon RCW 49.46.010; 49.52.050; 49.52.070 (an employer who pays lower wages than it is obligated to pay an employee or receives rebates from the employee's wages is guilty of a misdemeanor and the employee may recover two times the lost wages plus costs and attorney fees); (2) breach of fiduciary duty as to the six Spokane employees claiming that Phillips unlawfully interfered with their rights as participants in the SSP based upon ERISA, 29 U.S.C. § 1101 et seq.; (3) negligence; (4) breach of contract; (5) fraud; (6) negligent misrepresentation; (7) outrage; and (8) age discrimination, as to the six Spokane employees, based upon RCW 49.60 and 29 U.S.C. § 621 et seq. The employees' alleged damages included frustration of future additional retirement benefits, loss of earnings and earning capacity, and mental anguish and emotional distress.

Phillips moved to dismiss pursuant to CR 12(b)(1) or, in the alternative, for summary judgment on all causes of action. The court dismissed the first two causes of action --for benefits unlawfully withheld and breach of fiduciary duty--concluding that they were preempted by ERISA. The court denied Phillips' motion as to age discrimination; Phillips does not appeal this ruling. The court also denied the motion to dismiss the employees' state law causes of action for breach of contract and tort relying on Klank v. Sears Roebuck & Co., 735 F. Supp. 260 (N.D. Ill. 1990). The court reasoned that the essence of the employees' complaint was not benefits under the SSP, despite the fact that their causes of action for breach of contract or tort might result in an award of damages, one measure of which would be the SSP.

Phillips appeals the court's denial of the motion to dismiss the state law causes of action.

STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, CR 12(b)(6), presents a question of law which we review de novo. Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), adhered to on reconsideration, 113 Wn.2d 148, 776 P.2d 963 (1989).

ISSUE/CONTENTIONS

The dispositive issue, as framed by the employees' amended complaint and Phillips' answer, is whether the employees' claims "relate to" a benefit plan and are, therefore, preempted by ERISA. 29 U.S.C. § 1144(a).[1] The answer depends on the characterization of the allegations in

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[1] 29 U.S.C. § 1144(a) provides:

"Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." (Italics ours.)

the employees' complaint.

The employees claim that they are not seeking ERISA benefits wrongfully denied, but rather seek all damages which proximately flow from alleged misrepresentations regarding the security of their employment with Cepex. Those damages may, in part, be measured by benefits lost as a result of Phillips' conduct. The essence of their complaint is not that Phillips interfered with the attainment of benefits, but rather that Phillips, through various artifices, induced them to transfer to Cepex and, as a result, they incidentally lost benefits. Paragraph 9 of the amended complaint is illustrative:

> Defendant Phillips represented to the plaintiffs that Phillips had protected each of them by contracting or otherwise agreeing with Cepex concerning salary and benefits, and assured the plaintiffs that <u>any Phillips salary and benefits accrued by the plaintiffs with Phillips would be intact without reduction for a minimum of two years</u> after the date of sale to Cepex without reduction or elimination.

(Italics ours.)

Phillips' position on the other hand is that any claim for recovery based on an employee benefit necessarily implicates ERISA and is therefore preempted. Phillips contends that the employees have not only the right but the obligation to sue under ERISA "to recover benefits due . . . under the terms of [the] plan, to enforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits under the terms of the plan". 29 U.S.C. § 1132(a)(1)(B). Phillips characterizes the employees' complaint as one of interference with attainment of benefits.

Both parties cite more than 60 federal cases in support of their respective positions. Unfortunately, there is ample, well reasoned authority which would support either position. We limit our discussion of relevant case law to recent pronouncements by the United States Supreme Court and the Ninth Circuit of the United States Court of Appeals on the issue and the single case from this court discussing the issue.

Because the gravamen of the employees' complaint does not and cannot relate to an employee benefit plan, we conclude that preemption is not required.

RELATION OF COMPLAINT TO EMPLOYEE BENEFIT PLAN

> Whether state law "relates to" employee benefit plans is at the heart of the ERISA preemption inquiry, and its resolution is the key to resolving the fundamental federalism questions that ERISA poses.
>
> If ERISA preempted all state law relating to employee benefit plans, a dangerous vacuum would result. Progressive state legislation would be frustrated, and Congress might not fill the void with the necessary federal legislation. Major problem areas in employment law could be left unaddressed.... State law is ancillary and subordinate to the federal law but does play an important interstitial role.

Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. Pitt. L. Rev. 427, 457-58 (1987).

The Supreme Court construes the "relation to" language of the ERISA preemption broadly. Ingersoll-Rand

Co. v. McClendon, 498 U.S. 133, 112 L. Ed. 2d 474, 111 S. Ct. 478, 482 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 95 L. Ed.2d 39, 107 S. Ct. 1549, 1552-53 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380, 2385 (1985); Shaw v. Delta Air Lines. Inc., 463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890, 2901 (1983). A law relates to a plan "if it has a connection with or reference to such a plan." Shaw, 103 S. Ct. at 2900. But if the effect on the plan is "too tenuous, remote, or peripheral", the action does not relate to the plan. and preemption is not required. Shaw, 103 S. Ct. at 2901 n.21.

Phillips' preemption argument rests primarily on three cases: Ingersoll-Rand Co. v. McClendon, supra; Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991), cert. denied, U.S. __, 119 L. Ed. 2d 588, 112 S. Ct. 2968 (1992); Boutillier v. Libby, McNeill & Libby, Inc., 42 Wn. App. 699, 713 P.2d 1110, review denied, 106 Wn.2d 1905

(1986). We believe all are distinguishable although each is instructive.[2]

In Ingersoll-Rand, an employee asserted that his termination had resulted from his employer's attempt to avoid contributing to his pension fund--a cause of action expressly provided for by ERISA. 29 U.S.C. § 1140.[3]

2

Other United States Court of Appeals, Ninth Circuit, cases cited by Phillips in support of its preemption argument are also distinguishable: Felton v. Unisource Corp., 940 F.2d 503, 508 (9th Cir. 1991) (employee's claim that he was discharged to avoid payment of medical benefits expressly preempted by ERISA, 29 U.S.C. § 1140); Lea v. Republic Airlines, Inc., 903 F.2d 624, 631, 633 (9th Cir. 1990) and Nevill v. Shell Oil Co., 835 F.2d 209, 212 (9th Cir. 1987) (when employees had claims actionable under ERISA, state law causes of action were preempted); Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988) (suits for improper processing of employee's claims to welfare plan benefits are preempted by ERISA), cert. denied, 492 U.S. 906 (1989); Blau v. Del Monte Corp., 748 F.2d 1348, 1356 (9th Cir. 1984) (suit by former employees for benefits under employee welfare plan preempted), cert. denied, 474 U.S. 865 (1985).

3

29 U.S.C. § 1140 provides in relevant part:
"It shall be unlawful for any person to discharge . . . a

There, the court observed that the employee's wrongful discharge action required a finding that an ERISA plan existed and that the employer's motive was pension defeating. "[The existence of a pension plan [was] a critical factor in establishing liability under the State's wrongful discharge law.... [T]here simply [was] no cause of action if there [was] no plan." (Italics omitted.) Ingersoll-Rand,] 11 S. Ct. at 483, 484.

Here, a benefit plan is not essential to the action. In fact, other than potentially providing a measure for a portion of the damages to which these employees may be entitled, any benefit plan is irrelevant. The state law causes of action --negligence, breach of contract, fraud, negligent misrepresentation and outrage--would exist without any benefit plan, including the SSP. Jaskilka v. Carpenter Technology Corp.,

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participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

757 F. Supp. 175, 178 (D. Conn. 1991).

Following Ingersoll-Rand, the Ninth Circuit of the United States Court of Appeals decided Olson v. General Dynamics, supra. There, an employee sued three former employers in state court for fraud claiming they had misrepresented his retirement benefits. The product line on which he worked was sold by General Dynamics to Amex Systems, Inc., and thereafter to Science Applications International Corporation. Olson received commitments from the president of Amex that his benefits would be equal to or better than those afforded by his original employer, General Dynamics. After retirement, he received benefits which were considerably less than those he would have received under the General Dynamics' plan. The defendants removed the case to federal district court where they moved for summary judgment. The district court granted the motion, and the Ninth Circuit affirmed. The court held that the fraud claim related to the benefit plans and was therefore preempted.

Olson, at 1423.

Olson is factually distinguishable from this case. Olson's suit was for benefits denied under a retirement plan by one or more previous employers. The benefit plan was not the incidental measure of his damages; it was the basis for his claim. As in Ingersoll-Rand, without the benefit plan there was no basis for a suit. The Olson court makes the same point in distinguishing its decision in Martori Bros. Distribs. v. James-Massenaale, 781 F.2d 1349 (9th Cir.), amended, 791 F.2d 799, cert. denied, 479 U.S. 949, 1018 (1986):

> In Martori, the benefit plan in question was used only to measure the benefits that were awarded to union employees whose employers were found to have engaged in unfair labor practices. Because of those unfair practices, the plaintiffs did not receive the benefits that "might have been included had a contract been reached," Martori, 781 F.2d at 1353, and California law required the Court to look to the hypothetical "benefit package they would have received" to calculate the one-time, make-whole remedy.

Olson, at 1422.

Our state courts have addressed the meaning of the term "relates to" only once, in Boutillier v. Libby, McNeill & Libby, Inc., supra. The case is factually similar in that former employees sued Libby following the sale of one of its divisions and the transfer of that division's employees to California Canners and Growers. In Boutillier, as here, plans for enhanced separation benefits were not disclosed to transferring employees prior to their separation from Libby. The employees sued in state court alleging state law causes of action for breach of contract and estoppel and claiming a right to severance and other retirement benefits. Libby countered, citing language in the benefit plan which provided that those employees who continued with the purchasing company at comparable benefits and salaries were not entitled to severance benefits. Boutillier, at 704. We properly concluded that the claims relate to an "employee welfare benefit plan", 29 U.S.C. § 1002(1), and therefore those

"continued" employees' state law causes of action for estoppel and breach of contract were preempted by ERISA. Boutillier, at 711.

Despite the factual similarities the claims advanced in Boutillier are distinguishable. There, the employees made claims and stated causes of action for benefits they asserted were wrongfully denied under the separation pay plan--an employee benefit plan covered by ERISA. At issue was the benefit plan and its meaning. Boutillier, at 704. The employees asserted a right to severance pay claiming they were terminated within the meaning of the plan, not a claim for damages measured by benefits, as is the case here.

Moreover, the employees in Boutillier claimed that a conflict between the wording of the benefit plan document and a booklet explaining the document violated the provisions of ERISA. Boutillier, at 708. Again, a claim under ERISA. The basis for the suit here is not an employee benefit plan; rather, it is representations made by Phillips regarding

Cepex which induced these employees to transfer to their detriment. Recently, the Ninth Circuit of the United States Court of Appeals noted in Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992) that:

> ERISA preempts state law causes of action that offer remedies for the violation of rights expressly guaranteed by ERISA and exclusively enforced by ERISA's civil enforcement mechanism.... [A]n otherwise ERISA-preempted claim may survive to the extent that it relies on a theory independent of the benefit plan.

Tingey, at 1130-31. As long as the "underlying theory of the case revolves around the denial of benefits", state law causes of action are preempted. Tingey, at 1131 n.2. In that case, 10 state law causes of action were preempted because the underlying theory of all the causes of action was that the employee was fired to avoid the payment of benefits. Tingey, at 1131.

Here, the employees' underlying theories revolve around Phillips' alleged misrepresentations regarding Cepex,

not the denial of vested benefits. Simply put, the allegations are that Phillips made representations to these employees that induced them to transfer to Cepex. Those representations are alleged to be false, misleading, negligent and outrageous, and consequently may support causes of action under state law. If they are successful, the employees are entitled to recover damages which may be measured in part by benefits lost. The mere fact that they may be entitled to damages based on the loss of certain benefits in addition to salary and general damages should not result in their state law causes of action being preempted by ERISA.

Phillips' position would require preemption of a cause of action arising in an employment relationship when benefits are one measure for an element of damage. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890, 2901 n.21

(1983). This suit is not based on an employee benefit plan. No benefit plan is regulated, directly or indirectly, by these state law causes of action. The employees' state law causes of action do not "relate to" an employee benefit plan and therefore are not preempted by ERISA.

PARTICIPANTS

Moreover, if this court were to find the employees' state law causes of action preempted by ERISA, the employees would be placed in the unfair position of having no forum in which to raise their complaint regarding Phillips' conduct because they do not fall within the ERISA definition of "participant". Civil ERISA actions may be brought by a participant. 29 U.S.C. § 1132(a)(2).[4] A participant is defined as

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[4] 29 U.S.C. § 1132(a)(2) provides:
"A civil action may be brought--
". . . .
"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;"

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(Italics ours.) 29 U.S.C. § 1002(7).

It is not disputed that the employees here are "former employees" of Phillips. The issue is whether they "may become eligible to receive a benefit" under the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) discusses the definition of "participant". There, Firestone sold its plastics division to Occidental Petroleum Company. The six employees were hired by Occidental but sought severance pay from Firestone. They brought an ERISA action in federal court for benefits. Firestone refused to provide information regarding the plan contending that because the sale was not a "reduction in work force", the employees were not participants and

therefore not entitled to information regarding the plan. The dispute centered on the definition of the term "participant" found in 29 U.S.C. § 1002(7). The Court's discussion of the term "participant" is instructive:

> In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 476 (CA2 1985), or former employees who "have . . . a reasonable expectation of returning to covered employment" or have "a colorable claim" to vested benefits, Kuntz v. Reese, 785 F.2d 1410, 1411 (CA9) (*per curiam*), cert. denied, 479 U.S. 916, 107 S. Ct. 318, 93 L. Ed. 2d 291 (1986). In order to establish that he or she "may become eligible" for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. "This view attributes conventional meaning to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits 'may become eligible.' A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] 'may become eligible.'" Saladino v.

I.L.G.W.U. National Retirement Fund, supra, at 476.

Firestone, 109 S. Ct. at 958.

As the court noted in Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991), cert. denied, ___ U.S. ___, 119 L. Ed. 2d 588, 112 S. Ct. 2968 (1992), a plan must be in existence in order for the employees to potentially fall within the definition of participant. See Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349 (9th Cir.), amended, 791 F.2d 799, cert. denied, 479 U.S. 949, 1018 (1986). The employees here have "neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits . . .". Firestone, 109 S. Ct. at 958. They are not plan participants as defined by 29 U.S.C. § 1002(7)[5] nor do they claim to be. They do not

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[5]The employees are participants in Phillips' original employee benefit plan, but that plan and its benefits are not at issue in this case.

have standing to bring an ERISA action. 29 U.S.C. § 1132(a). It would be ironic indeed if the employees, who admit they are not participants in the SSP, were denied state law causes of action by the adoption of a benefit program which followed their departure from Phillips.

The judgment of the trial court is affirmed and the case remanded for trial.

s/Sweeney, A.C.J.

WE CONCUR:

s/Sheilds, J.P.T.

s/Munson, J.

[No. 61160-2. En Banc. [sic]

ALVIN B. CUTLER, ET AL, Respondents v. PHILLIPS PETROLEUM COMPANY, Petitioner.

[1] Dismissal and Nonsuit -- Failure To State Claim -- Review -- Standard of Review. A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that is reviewed de novo by an appellate court.

[2] Dismissal and Nonsuit -- Failure To State Claim -- Test -- In General. An action is subject to dismissal under CR 12(b)(6) for failure to state a claim upon which relief can be granted if a court, assuming the truth of the plaintiff's allegations and considering hypothetical facts not part of the formal record, concludes beyond a reasonable doubt that no facts exist that would justify recovery.

[3] Pensions -- ERISA -- Federal Preemption -- "Relating to" Employee Benefit Plan -- What Constitutes. For purposes of 29 U.S.C. § 1144(a), under which a state law is preempted by the Federal Employee Retirement Income Security Act of 1974 if the law relates to an employee benefit plan, a state law "relates to" an employee benefit plan if it has a connection with or refers to such a plan. Preemption occurs even if the law is not specifically designed to affect employee benefit plans, the effect on the plans is only indirect, or the law is consistent with the Act's substantive requirements.

[4] Pensions -- ERISA -- Federal Preemption -- Tort and Contract Claims. State common law tort and contract claims are explicitly preempted by the Federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(a)) if they are premised on the existence of an employee benefit plan that is covered by the Act. If a state court's inquiry is directed to an employee

benefit plan in order to determine the merits of a claim, the claim is preempted.

[5] Pensions -- ERISA -- Federal Preemption -- Implicit Preemption. The right of action provided by 29 U.S.C. § 1132(a)(3) of the Federal Employee Retirement Income Security Act of 1974 is the exclusive remedy available to an employee benefit plan participant for enforcing rights guaranteed by the Act. State causes of action that conflict with a cause of action brought under the Act are implicitly preempted.

[6] Pensions -- ERISA -- Federal Preemption -- Ability To Bring Federal Action -- Effect. A plaintiff's ability to bring an action in federal court if the plaintiff's claim in state court is preempted by the Federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(a)) is not relevant to the preemption issue.

ANDERSEN, C.J., concurs in the result only; GUY, J., did not participate in the disposition of this case.

Nature of Action: Twelve former employees who had lost their jobs after their former employer sold the plants in which they worked sought damages from their former employer. The plaintiffs claimed negligence, outrage, breach of contract, negligent misrepresentation, and fraud. Six of the plaintiffs also claimed age discrimination, breach of fiduciary duty, and wrongful withholding of benefits.

Superior Court: The Superior Court for Spokane County, No. 89-2-00798-8, Richard J. S roeder, J., on March 6, 1992, dismissed the breach of fiduciary duty and wrongful withholding of benefits causes of action but refused to dismiss the remaining claims.

Court of Appeals: The court at 71 Wn. App. 511 affirmed the judgment, holding that the employee's state law causes of action do not relate to an employee benefit plan and were not preempted by the Federal Employee Retirement Income Security Act or 1974. The employer did not appeal the refusal to dismiss the age discrimination claim.

Supreme Court: Holding that the claims for negligence, outrage, breach of contract, negligent misrepresentation, and fraud are explicitly and implicitly preempted by the Federal Employee Retirement Income Security Act of 1974, the court reverses the decision of the Court of Appeals and dismisses the five claims.

John L. Williford, Associate General Counsel, and Janet M. Reasor; Paine, Hamblen, Coffin, Brooke & Miller, by Richard D. McWilliams and Simon R. Collins, for petitioner.

Evans, Craven & Lackie, P. S ., and Patrick M. Risken; Feltman, Gebhardt, Eymann & Jones and Richard C. Eymann, for respondents .

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALVIN B. CUTLER AND JOYCE P. CUTLER, a Marital Community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a Marital Community; BILL E. DAISS and MARJOE DAISS, a Marital Community; LARRY O. GUST, a Single Person; KENNETH M. JANSEN AND MARGARET V. JANSEN, a Marital Community; MARVIN PAUL AND JANICE PAUL, a Marital Community; RICHARD A. DAVIS, and his Marital Community; FRED LINDBERG and his Marital Community; JERRY KOONTZ, and his Marital Community; DAVID L. HOFFARTH and his Marital Community; RICHARD G. ALLEN, and his Marital Community; and SUSAN R. HOOVER AND ALLEN V. HOOVER, a Marital Community,	)	Number 61160-2
Respondents	)	En Banc
v.	)	
PHILLIPS PETROLEUM COMPANY, A Foreign Corporation,	)	Filed SEP 29 1994
Petitioner	)	

SMITH, J.--Petitioner Phillips Petroleum Company (Phillips) seeks reversal of a published opinion of the Court of Appeals, Division Three, which affirmed and remanded for trial an order of the Spokane County Superior Court denying Phillips' motion to dismiss for failure to state a claim upon which relief may be granted in a suit by 12 former employees (Respondents) for negligence, outrage, breach of contract, negligent misrepresentation and fraud. We reverse the Court of Appeals.

STATEMENT OF FACTS[1]

Respondents were employed by Petitioner Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, prior to December 1985. Most had served Phillips for over twenty years. In December 1985, Respondents worked for Phillips' fertilizer

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1 This being a motion to dismiss for failure to state a claim under CR 12(b)(6), the statement of facts is based substantially on the complaint.

and chemical divisions in manufacturing plants located at Spokane and Finley.[2]

In December 1985, Phillips faced a threatened hostile takeover. It decided to liquidate some of its debts and other obligations by selling assets and transferring employees, including the plants and employees at Spokane and Finley, to Cepex American of Amarillo, Texas (Cepex).[3]

The complaint alleges that in December 1985 Phillips' management team represented to Respondents that Phillips had protected them by contracting or otherwise agreeing with Cepex that any salary and benefits accrued by each of them with Phillips would not be reduced or eliminated by Cepex for a minimum of 2 years after the date of sale. The complaint also alleges that Phillips assured Respondents it would sell the

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[2] First Amended Complaint for Damages; Clerk's Papers, at 18-20.

[3] Clerk's Papers, at 20.

plants to a company with the financial ability and commitment to run the business for a substantial period of time. The complaint further alleges Philips led Respondents to believe retirement benefits accrued with Phillips to date would remain with Phillips; they would be eligible for early retirement benefits from Phillips after sale of the plants to Cepex; and Cepex would assume administration of all benefits due them from Phillips. The sale to Cepex occurred 3 months later on March 1, 1986.[4]

A request by one respondent for transfer within Phillips was denied. Other employees not involved in this lawsuit were re-trained for new assignments within the company. The other respondents acquiesced to employment with Cepex without requesting transfers within Phillips and without seeking outside employment. The complaint alleges it soon became apparent

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[4]Clerk's Papers, at 20-21.

Cepex could not continue operation of the plants.[5]

On April 3, 1986, one month after the sale to Cepex, Phillips announced a "Special Separation Program", which included enhanced retirement benefits, severance pay, outplacement and housing assistance, and medical and life insurance benefits. Only "Phillips employees" who separated from the company during the three-month period from April 3 through July 1, 1986 were eligible. The program also included special additional compensation (Social Security make-up payments) for employees age 50 through 61 who chose early retirement.[6]

The complaint alleges Respondents believed they were eligible to take advantage of the special separation program based upon Phillips' prior assurances. Their requests were denied. Phillips informed them they were not "Phillips

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[5]Clerk's Papers, at 21.

[6]Clerk's Papers, at 21-22.

employees" on April 3, 1986. The respondent whose prior request for transfer within the company had been denied was technically eligible for the special separation program under Phillips' guidelines because he was still a "Phillips employee" and had not acquiesced to employment with Cepex. Phillips retired him without choice under its old retirement system and without an opportunity to take advantage of the special separation program.[7]

The complaint also alleges that while Respondents were "vigorously encouraged" to go to Cepex along with the transfer of assets, Phillips employees of higher rank than Respondents were allowed to remain with Phillips after the sale long enough to avail themselves of the special separation program. The complaint further alleges those higher ranking Phillips employees knew of the special separation program "or its possibility" prior to the date of sale on March 1, 1986, but

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[7]Clerk's Papers, at 22.

did not disclose its existence to any of the Respondents.[8]

On December 26, 1986, only 9 months after the sale, Respondents were laid off or otherwise separated from employment with Cepex despite the assurances and representations previously made to them by Phillips. The complaint alleges that as a consequence of its actions regarding elimination of Respondents' compensation and benefits, Phillips received a windfall from its retirement or pension trust which it used to reduce its outstanding debt and fight off any hostile takeover bid.[9]

On February 28, 1989, six employees filed a complaint against Phillips in Spokane County Superior Court. The employees at Finley originally filed a suit in Benton County, which was transferred to Spokane County and consolidated with that case. Respondents seek damages for Phillips'

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[8]Clerk's Papers, at 23.

[9]Clerk's Papers, at 23.

negligence, outrage, breach of contract, negligent misrepresentation and fraud. In addition, on behalf of six of the twelve Respondents, the complaint seeks damages for age discrimination under RCW 49.60 and 29 U.S.C.§ 621 *et seq.* and breach of fiduciary duty for unlawful interference with their rights as participants in the special separation program under ERISA, 29 U.S.C.§ 1101 *et seq.* The complaint also seeks damages for benefits unlawfully withheld under RCW 49.46.010, RCW 49.52.050 and .070, which together provide that an employer who pays lower wages than the employer is obligated to pay an employee or who receives a rebate from an employee's wages is guilty of a misdemeanor and the employee may recover two times the lost wages plus costs and attorney fees.[10]

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[10] First Amended Complaint for Damages at 7-12; Clerk's Papers, at 23-28.

Phillips moved to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6). On December 20, 1991, the trial court, the Honorable Richard J. Schroeder, granted the motion in part. The court determined the claim for breach of fiduciary duty under ERISA was clearly pre-empted by 29 U.S.C.§ 1132(e). It also determined the claim for benefits unlawfully withheld under RCW 49.46.010, RCW 49.52.050 and .070 was pre-empted by ERISA because it is "related to an employee benefit plan". The other six causes of action were not dismissed. The court determined they were state law claims independent of the ERISA claim and that the benefits plan (special separation plan) was merely one measure of damages. The court filed its order as a "final judgment" on March 6, 1992.[11]

Phillips appealed the trial court's order to the Court of Appeals, Division Three, but did not appeal the trial court's

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[11]Clerk's Papers, at 128-42.

ruling on the age discrimination issue. The Court of Appeals accepted review on the five remaining causes of action (negligence, outrage, breach of contract, negligent misrepresentation and fraud). On October 21, 1993, the Court of Appeals, the Honorable Dennis J. Sweeney writing, affirmed the reasoning of the trial court and remanded for trial.[12]

Phillips moved this court for discretionary review of the decision of the Court of Appeals, Division Three. We granted review on April 6, 1994.

QUESTION PRESENTED

The question presented in this case is whether claims for negligence, outrage, breach of contract, negligent misrepresentation and fraud "relate to an employee benefit plan" under the exclusive jurisdiction of the Federal Employee Retirement Income Security Act of 1974 (ERISA) to the

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Cutler v. Phillips Petroleum Co., 71 Wn. App. 511, 859 P.2d 1251 (1993). Neither party questioned the appealability of the trial court's order.

extent that they are pre-empted by federal law and require dismissal from state court.

DISCUSSION

Standard of Review

A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court.[13] Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. "Under this rule, a plaintiff's allegations are presumed to be true", and "a court may consider hypothetical facts not part of the formal record." CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes

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13 *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd on rehearing*, 113 Wn.2d 148, 776 P.2d 963 (1989); *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984).

allegations that show on the face of the complaint that there is some insuperable bar to relief.[14]

CR 12(b)(6) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:..(6) failure to state a claim upon which relief can be granted, ...A motion making any of these defenses shall be made before pleading if a further pleading is permitted...If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense

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Hoffer, at 420 (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice* § 1357, at 604 (1969)); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978); *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978). *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice* § 1357, at 344 (1990); 27 Federal Procedure *Pleadings and Motions* § 62:465 (1984).

> numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as pro-vided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Structure of ERISA

The Employee Retirement Income Security Act of 1974[15] provides a comprehensive system for federal regulation of private employee benefit plans, including pension and welfare plans. A welfare plan includes, among other things, any "plan, fund, or program" maintained for the purpose of providing medical or other health benefits for employees or their beneficiaries "through the purchase of insurance or otherwise."[16] Subject to certain exemptions, ERISA applies

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[15] Pub. L. No. 406, 88 Stat. 829 (current version at 29 U.S.C.§ 1101 *et seq.*).

[16] 29 U.S.C.§ 1002(1).

generally to all employee benefit plans sponsored by an employer or employee organization.[17] "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans."[18] In order to safeguard this integrated regulatory system, Congress provided, among other things, a ""'carefully integrated"' [sic] civil enforcement scheme `that is one of the essential tools for accomplishing the stated purposes of ERISA"',[19] that is, a prohibition against

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[17] 29 U.S.C.§ 1003(a).

[18] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 112 L.Ed. 2d 474, 111 S. Ct. 478 (1990) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983)).

[19] *Ingersoll-Rand*, 498 U.S. at 137 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)). 29 U.S.C.§ 1132(a) (ERISA § 502(a)).

interference with rights protected by ERISA[20] and ERISA's broad pre-emption.[21]

ERISA Pre-emption of State Law

29 U.S.C. § 1144(a), (ERISA § 514(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchap-ter and subchapter III of this chapter shall *supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

(Italics ours.)

Under the United States Supreme Court's broad interpretation of ERISA's pre-emption language, [22] a state law

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[20] 29 U.S.C. § 1140 (ERISA § 510).

[21] 29 U.S.C. § 1144 (ERISA § 514(a)).

[22] *District of Columbia v. Greater Wash. Bd. of Trade*, __ U.S. ___, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-39, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829, 100 L. Ed. 2d 836, 108 S. Ct. 2182

"relates to" an employee benefit plan "if it has a *connection with or reference to such a plan.*"[23] But if the effect on the plan is "too tenuous, remote, or peripheral", the state action does not "relate to" the plan and pre-emption is not required.[24] In *District of Columbia v. Greater Wash. Bd. of Trade*, ___ U.S. ___, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992) the court stated:

> This reading is true to the ordinary meaning of "relate to," and thus gives effect to th "deliberately expansive" language chosen by Congress. Under § 514(a), ERISA pre-empts any state law that *refers to or has a connec-*

(1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-47, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732-33, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99-100, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983). Accord *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn2d 565, 568-70, 870 P.2d 960 (1994); *Boutillier v. Libby, McNeill & Libby, Inc.*, 42 Wn.App. 699, 713 P.2d 1110, *review denied*, 106 Wn.2d 1005 (1986).

[23](Italics ours.) *Shaw*, 463 U.S. at 97.

[24]*Shaw*, at 100 n.21.

> *tion with* covered benefit plans (and that does not fall within a § 514(b) exception) "even if the law is not specifically designed to affect such plans, or the effect is only indirect," and even if the law is "consistent with ERISA's substantive requirements".[25]

(Citations omitted. Italics ours.)

In *District of Columbia v. Greater Wash. Bd. of Trade, supra,* the Supreme Court determined that a law which related primarily to workers' compensation was pre-empted by ERISA. The purpose of the statute was to fully compensate

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[25] *District of Columbia v. Greater Wash. Bd. of Trade,* 113 S. Ct. at 583 (citing Black's Law Dictionary 1288 (6th ed. 1990); *Pilot Life,* 481 U.S. at 46; *Ingersoll-Rand,* 498 U.S. at 139; *Metropolitan* Life, 471 U.S. at 739). See *Morales v. Trans World Airlines, Inc.,*___ U.S. __, 119 L. Ed. 2d 157, 112 S. Ct. 2031, 2037 (1992), where the Court recently applied the same meaning of "relates to" in ERISA to the "relating to" language of the preemption clause in the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1301 *et seq.* (ADA), concluding that a claim for deceptive advertising under general consumer protection statutes of Texas was preempted by the ADA even though the specific language of the ADA only prohibits states from enforcing any law "relating to rates, routes, or services" of any air carrier (49 U.S.C. app. § 1305(a)(1)).

injured workers who, when healthy, normally receive payment from their employer in cash, medical insurance and other benefits. The regulations existing prior to enactment of the District of Columbia worker's compensation equity amendment act of 1990,[26] section 2(c)(2), only required payments to injured workers, during their period of disability, in amounts equivalent to 50 percent of their average weekly salaries. Many injured workers did not receive the full entitlement intended by the original statute.

The Court concluded that "[s]ection 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." It observed that the health insurance coverage required by the District of Columbia under the act "is measured by reference to the existing health insurance coverage'

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[26] D.C. Code Ann. § 36-301 to § 36-345 (1993 & Supp. 1994).

provided by the employer" which "in turn, is a welfare benefit plan...subject to ERISA regulation...and any state law imposing requirements by reference to such covered programs must yield to ERISA."[27] This conclusion was reached despite the fact that plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" are specifically exempt from ERISA coverage.[28]

The determinative factor for the Court in *District of Columbia v. Greater Wash. Bd. of Trade, supra,* was that the

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[27] *District of Columbia v. Greater Wash. Bd. of Trade,* 113 S. Ct. at 583-84 (citing *Mackey v. Lanier Collection Agency & Serv. Inc.,* 486 U.S. at 828 n.2, 829-30, where the court struck down a Georgia statute which attempted to carry out the substance of an ERISA provision. In that case, garnishment of ERISA welfare plan funds was not permitted under the new Georgia statute. However, a general and older Georgia statute permitted garnishment of any funds. The mere fact that ERISA-covered plans were mentioned was enough to pre-empt and invalidate the new statute. However, the general and older garnishment statute was not pre-empted, even though it could be enforced against ERISA welfare plans).

[28] 29 U.S.C. § 1003(b)(3).

regulation "referred to" ERISA-covered plans. This gives a stronger impact to milder qualifying language than in the previous case of *Shaw v. Delta Air Lines, Inc.*,[29] which concluded that if the effect on an ERISA-covered plan is "too tenuous, remote, or peripheral", the state action does not "relate to" the plan and pre-emption is not required.[30] The Supreme Court seems now to be moving in the direction of an absolute pre-emption of state law by ERISA.[31]

This court in *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994) acknowledged the broad nature of pre-emption under ERISA and analyzed the approach to ERISA pre-

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[29] 463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983).

[30] *Shaw*, 463 U.S. at 100 n.21.

[31] *See District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. at 585-88 (Stevens, J., dissenting).

emption articulation by the United States Supreme Court.[32] We concluded that Washington's public works lien statutes[33] were pre-empted by ERISA.[34]

In a case similar to the one now before this court, the United States Supreme Court determined that state common law tort and contract claims are pre-empted if they "refer to" and are "premised on' [sic] the existence of an ERISA-covered pension plan." In *Ingersoll-Rand Co. v. McClendon,*[35] the plaintiff filed suit in a Texas state court seeking "compensatory

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[32] *Puget Sound Electric Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn2d at 568-70 (citing *Shaw; Metropolitan Life; Pilot Life; Ingersoll-Rand*). *See also Boutillier v. Libby, McNeill & Libby, Inc.*, 42 Wn.App. 699, 713 P.2d 1110, *review denied,* 106 Wn.2d 1005 (1986) (finding ERISA pre-emption even when state action only "indirectly" impacts an ERISA-covered plan).

[33] RCW 39.08 and RCW 60.28.

[34] *Puget Sound Electrical Workers,* at 573.

[35] 498 U.S. 133, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).

and punitive damages under various tort and contract theories; he did not assert any cause of action under ERISA."[36] The Court noted that the Texas Supreme Court concluded the suit was not pre-empted by ERISA because the plaintiff was "*not* seeking lost *pension benefits* but [was] instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge."[37] The Court nevertheless found explicit and implied pre-emption under ERISA.

In finding explicit pre-emption under ERISA § 514(a), 29 U.S.C. § 1144(a), the Court reasoned that:

> The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan. In the words of the Texas court, the cause of action "allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension

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[36] *Ingersoll-Rand*, at 136.

[37] *Ingersoll-Rand*, at 136 (quoting *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 (Tex. 1989).

> fund." Thus in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. *Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an* ERISA *plan.*[38]

The Court also found that if no express pre-emption provision existed under ERISA § 514(a), 29 U.S.C. § 1144(a), the cause of action would still be pre-empted "because it conflicts directly with an ERISA cause of action...[since it] falls squarely within the ambit of ERISA § 510 [29 U.S.C. § 1140]."[39] The provision states in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan... *or for the purpose of inter-fering with the attainment of any right to which such*

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[38] (Italics ours.) *Ingersoll-Rand*, at 140 (quoting *McClendon*, 779 S.W.2d at 71).

[39] *Ingersoll-Rand*, at 142.

> *participant may become entitled* under the plan....

(Italics ours.) 29 U.S.C. § 1140.

The Court observed that "[t]he mere existence of a federal regulatory or enforcement scheme... does not by itself imply pre-emption of state remedies."[40] Thus it looked to ERISA § 502(a), 29 U.S.C. § 1132(a), the civil enforce-ment mechanism, as a "special feature[] [sic] warranting pre-emption."[41] That section, enacted as 29 U.S.C. § 1132(a)(3) and (e), provides in relevant part:

> (a) A civil action may be brought --
>
> ....
>
> (3) by a participant... (A) to enjoin any act or practice which violates any provi-sion of

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40 *Ingersoll-Rand*, at 143 (quoting *English v. GE Co.*, 496 U.S. 72, 87, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990)).

41 *Ingersoll-Rand*, at 143 (quoting *English v. GE Co.* 496 U.S. at 87 (quoting *Hillsborough Cy., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985))).

> this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this sub-chapter or the terms of the plan;
>
> ....
>
> (e) ....
>
> (1) Except for actions under subsec-tion (a)(1)(B) of this section, the district courts of the United States shall have *exclusive jurisdiction* of civil actions under this subchapter brought by ... a participant[.]

(Italics ours.)

The Court concluded that "Congress intended § 502(a) [29 U.S.C. § 1132(a), (e)] to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510 [29 U.S.C. § 1140]."[42] The court stated:

> As we explained in *Pilot Life*, ERISA's legislative history makes clear that "the pre-emptive force of § 502(a) was modeled on the exclusive remedy provided by § 301 of the

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[42] *Ingersoll-Rand*, at 144 (citing *Pilot Life*, 481 U.S. at 54).

> Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U.S.C. §185 "Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state-law claims, "even when the state action purported to authorize a remedy unavailable under the federal provi-sion."[43]

In this case, the trial court determined that the claim for breach of fiduciary duty under ERISA was clearly pre-empted by 29 U.S.C. § 1132(e). It also determined the claim for benefits unlawfully withheld under RCW 49.46.010, 49.52.050 and .070 was also pre-empted by ERISA under 29 U.S.C. § 1144(a) because it is "related to an employee benefit plan."

Respondents assert, and the trial court and the Court of Appeals agreed, that their claims for negligence, outrage, breach of contract, negligent misrepresentation and fraud are not "premised on" the ERISA claims dismissed by the trial court. However, as Petitioner Phillips points out, the essence

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[43] (Citation omitted.) *Ingersoll-Rand*, at 144 (quoting *Pilot Life*, 481 U.S. at 52, 54-55 (citing H.R. Conf. Rep. No. 1280, at 327, 93d Cong. (1974))).

of the claims is the Respondents' perceived loss of benefits under the special separation plan. Petitioner cites paragraph XVI of the complaint, which states:

> By offering the early retirement programs, selling employees as assets, and by refusing to allow employees, including certain of the plaintiffs, any opportunity to take advantage of the early retirement program, defendant Phillips received a windfall from its retirement or pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt and to fight off any hostile takeover bid.[44]

Under the reasoning of the United States Supreme Court in *Ingersoll-Rand*, this lawsuit is pre-empted because the complaint makes specific reference to existence of a pen-sion plan. Respondents pleaded that an ERISA plan exists and that Phillips had a pension-defeating motive in terminating their employment. "Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an

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[44]Clerk's Papers, at 23.

ERISA plan."[45] Under this rationale, the remaining common law tort and contract claims are explicitly pre-empted by ERISA § 514(a), 29 U.S.C. § 1144(a).

Even if they were not explicitly pre-empted, these claims would be implicitly pre-empted under ERISA § 502(a), 29 U.S.C. § 1132(a), (e The Court in *Ingersoll-Rand* reiterated that when Congress patterned ERISA § 502 after LMRA § 301,[46] it "was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state court claims "even when the state action purported to autho-rize a remedy unavailable under the federal provision."[47]

Respondents assert that if their claims are not allowed to proceed in state court, they will not have a forum in the federal courts. This is a matter which should be addressed to

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[45] *Ingersoll-Rand*, at 140.

[46] National Labor Relations Act, 1947 § 301, 61 Stat. 136, 156 (current version at 29 U.S.C. § 185).

[47] *Ingersoll-Rand*, at 144 (quoting *Pilot Life*, at 55).

the federal courts. The United States Supreme Court in *Ingersoll-Rand* stated that

> [T]he pre-emptive effect of § 502(a) [is] so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitation imposed by the "well-pleaded complaint" rule.[48]
>
> ....
>
> .... Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide.[49]

Respondents might have had valid common law tort and contract claims in the state court if they were completely unrelated to an ERISA-covered plan. However, that is not the case under these facts. The most significant loss they suffered

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[48] *Ingersoll-Rand*, at 145 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)).

[49] *Ingersoll-Rand*, at 145.

was their inability to participate in the ERISA-covered plan. They brought the lawsuit primarily demanding damages equivalent to the value of benefits under the plan. They claim Phillips encouraged them to transfer their employment to Cepex in order to, among other things, exclude them from participation in the ERISA-covered special separation program. Because the court's inquiry must be directed to the plan, the entire action falls within the scope of ERISA pre-emption.[50]

Respondents attempt to distinguish *Ingersoll-Rand* by citing cases from lower federal courts.[51] However, they ignore

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[50]*See Ingersoll-Rand*, at 140.

[51] *See Jaskilka v. Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (D.C Conn. 1991) (distinguishing cases where benefits lost are "relevant only to the issue of damages"). *See also Taylor v. Parker Seal Co.*, 975 F.2d 252 (6th Cir. 1992); *Samuel v. Langham*, 780 F. Supp. 424 (N.D. Tex. 1992); *Sperling v. Texas Health Enters., Inc.*, 791 F. Supp. 662, 665 (S.D. Tex 1992); *Howard v. Indiana Mich. Power Co.*, 812 F. Supp. 135 (S.D. Ind. 1992); *Klank v. Sears, Roebuck & Co.*, 735 F. Supp. 260 (N.D. Ill. 1990).

the broad language used by the Supreme Court in *District of Columbia v. Greater Washington Board of Trade*, a 1992 decision concerning ERISA and pre-emption of state law.[52] Thus, regardless what lower federal courts may have ruled to avoid the result in *Ingersoll-Rand*, the United States Supreme Court now clearly requires pre-emption in cases where state courts must inquire into the existence of an ERISA-covered plan in order to determine whether the employer had a pension-defeating motive or in cases in state courts where the action "refers to" an ERISA-covered plan. The result is the same even if the case does not involve administration of a plan nor litigation concerning a plan, plan-fiduciaries, employers and beneficiaries.

Whether Respondents would have standing under ERISA to bring their claims in federal court as "participants"

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[52] *See District of Columbia v. Greater Wash. Bd. of Trade, supra.*

in the special separation program is of little significance on the issue of pre-emption. The United States Supreme Court has made it clear that when pre-emption applies in the ERISA context, it sweeps aside even state laws which are consistent with the substance of the ERISA provisions. The court has also stated that "'good intentions' do not save a state law within the broad pre-emptive scope of § 514(a) [29 U.S.C.§ 1144(a)]."[53] Providing an adequate forum for ERISA-related claims is for the Congress and not for the legislatures or courts of individual states.

SUMMARY AND CONCLUSIONS

Respondents' claims for breach of fiduciary duty and for interference with attainment of benefits were properly dismissed by the trial court based upon ERISA pre-emption.

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[53] *See Mackey v. Lanier Collection Agency & Serv., 486 U.S. at 829-30.*

The claim for age discrimination was not dismissed and is not before this court.

Respondents' five remaining claims for negligence, outrage, breach of contract, negligent misrepresentation and fraud should also have been dismissed under ERISA pre-emption. It is clear from the language of their complaint that Respondents' lawsuit is "premised on" their claim of interference with attainment of benefits under ERISA § 510, 29 U.S.C. § 1140. The United States Supreme Court in *Ingersoll-Rand* determined that if a state court must inquire whether a benefit plan exists in order to determine whether a claim exists, then a cause of action is "premised on" and therefore "related to" an ERISA-covered plan. Under ERISA § 514(a), 29 U.S.C. § 1144(a), if a state law "relates to" an ERISA-covered plan, it is explicitly pre-empted. Even if these causes of action were not explicitly pre-empted, they would be implicitly pre-empted under ERISA § 502(a), 29 U.S.C. § 1132(a) and *Ingersoll-Rand.*

We reverse the Court of Appeals and dismiss the five causes of action before this court because they are pre-empted under ERISA.

s/Smith, J.

WE CONCUR:

s/Andersen, C.J. s/Durham, J.

Concurs in the result.
s/Utter, J.

s/Brachtenbach, J. s/Johnson, J.

s/Dolliver, J. s/Madsen, J.

THE SUPREME COURT OF WASHINGTON

ALVIN B. CUTLER AND JOYCE P. CUTLER, a Marital Community; et al.,	)	NO. 61160-2
Respondents,	)	ORDER DENYING
v.	)	MOTION FOR RECONSIDERATION
PHILLIPS PETROLEUM COMPANY,	)	
Petitioner.	)	

The Court having determined that the Respondents' Motion for Reconsideration be denied;

Now, therefore, it is hereby

ORDERED:

That Respondents' Motion for Reconsideration is denied.

DATED at Olympia, Washington this 13th day of December, 1994.

s/Andersen, C.J.
CHIEF JUSTICE

124 Wn.2d 749

THE SUPREME COURT OF WASHINGTON

ALVIN B. CUTLER, et ux., et al.,	)	
	)	MANDATE
Respondents,	)	
v.	)	NO. 61160-2
	)	
PHILLIPS PETROLEUM COMPANY,	)	Spokane County No. 89-2-00798-8
	)	
Petitioner.	)	C/A No. 12271-9-III

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on September 29, 1994, became the decision terminating review of this Court in the above entitled cause on December 13, 1994. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $1,059.70 awarded to Petitioner and against Respondents. Order Denying Motion for Reconsideration was entered herein on December 13, 1994. Copy attached.

[SEAL] IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of December, 1994.

s/
RONALD R. CARPENTER
Deputy Clerk of the Supreme Court,
State of Washington

cc: Richard McWilliams
Simon Collins
Patrick Risken
Richard C. Eymann
Clerk, Division III
Reporter of Decisions

Judgment : $ 1,059.70
Attys Fees
Costs

Supreme Court, U.S.
FILED
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(2)

No. 94-1811

In The

Supreme Court of the United States

October Term, 1994

ALVIN B. CUTLER and JOYCE P. CUTLER, et ux, et al.,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY, a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PHILLIPS PETROLEUM COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LOPP

QUESTIONS PRESENTED

1. Whether the petitioners have demonstrated a split in authority amongst the circuit courts of appeal on the issue of the scope and extent of federal preemption under the Employment Retirement Income Security Act of 1974.

2. Whether the issues presented by the petitioners are of sufficient national importance to warrant review by the United States Supreme Court.

PARTIES

ALVIN B. CUTLER, and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARIJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; MARVIN PAUL and JANICE PAUL, a marital community; RICHARD A. DAVIS and his marital community; FRED LINDBERG and his marital community; JERRY KOONTZ and his marital community; DAVID L. HOFFARTH and his marital community; RICHARD G. ALLEN and his marital community; SUSAN R. HOOVER and ALLEN V. HOOVER, a marital community,

Petitioners,

and

PHILLIPS PETROLEUM COMPANY,[1] a foreign corporation,

Respondent.

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[1] All of Phillips Petroleum Company's subsidiaries are wholly-owned, except PHILLIPS GAS COMPANY, which has issued its own stock.

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I. GROUNDS FOR JURISDICTION

The decision of the Supreme Court for the State of Washington was entered on September 29, 1994, and a timely petition for rehearing was denied on December 13, 1994. The Petition for Writ of Certiorari was filed on March 13, 1995. Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

II. STATEMENT OF THE CASE

Prior to December 1985, petitioners were employees of a subsidiary of respondent Phillips Petroleum Company ("Phillips"). Because of the expenses involved in fighting an attempted hostile takeover, Phillips decided to sell assets in order to reduce its debt. One of those assets was its fertilizer division, by which the petitioners were employed. On December 31, 1985, Phillips consolidated all of its fertilizer business into one subsidiary, American Fertilizer and Chemical Company, and transferred the fertilizer employees, including the petitioners, to the payroll of that subsidiary. On February 28, 1986, Phillips sold its interest in American Fertilizer and Chemical Company to Cepex, Inc. Petitioners were offered and accepted employment with the new owner, Cepex, Inc.

On April 3, 1986, Phillips and certain participating subsidiaries offered a "special separation program" of enhanced retirement and other benefits to their employees who met the requirements of the plan, and who subsequently ended employment during a window period, from April 3, 1986, through July 1, 1986. Several of the petitioners sought to take advantage of this program. Their requests were denied because at the time the "special separation program" was offered, the petitioners were no longer employees of Phillips or its participating subsidiaries. On or about December 26, 1986, each petitioner ended gainful employment with Cepex, Inc.

Thereafter, the petitioners filed a Complaint and then a First Amended Complaint, alleging eight causes of

action seeking monetary damages against Phillips for "frustration of retirement and other benefits due to plaintiffs (petitioners) and wrongfully denied or withheld by defendant Phillips." *See* Appendix ("App."). The petitioners' eight causes of action were: (1) Breach of fiduciary duty and interference with protected rights pursuant to the Employment Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001, *et seq.* (*See* App. A-7 and A-23); (2) Benefits unlawfully withheld pursuant to the Revised Code of Washington (RCW 49.46.010, 49.52.050, 49.52.070); (*See* App. A-7 and A-20); (3) Age discrimination pursuant to RCW 49.60.010, *et seq.*, and 29 U.S.C. § 621, *et seq.* (*See* App. A-8 and A-24); (4) Negligence (*See* App. A-8 and A-20); (5) Breach of contract, either written, oral, or implied (*See* App. A-9 and A-21); (6) Fraud (*See* App. A-10 and A-22); (7) Outrage (*See* App. A-10 and A-23); and (8) Negligent misrepresentation (*See* App. A-11 and A-22).

Phillips moved to dismiss the petitioners' first, second and fourth through eighth causes of action,[2] arguing that (1) the first cause of action was an ERISA cause of action within the exclusive jurisdiction of the federal courts pursuant to 29 U.S.C. § 1132(e); and that (2) the second, fourth, fifth, sixth, seventh and eighth causes of action were "related to" an employee benefit plan and, therefore, preempted by ERISA, pursuant to 29 U.S.C. § 1144(a).

The trial court held that the petitioners' first cause of action was an ERISA claim within the exclusive jurisdiction of the federal courts, and further, that the second cause of action, a state law claim for employee benefits unlawfully withheld, was "related to" an employee benefit plan and, therefore, preempted by ERISA as a matter

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[2] Phillips also moved to dismiss the petitioners' third cause of action, age discrimination, on different grounds. Phillips, however, did not appeal the denial of its motion with respect to this claim.

of law. As a result, these two claims were dismissed and petitioners did not appeal. *See* Petitioners' App. A-1 to A-16.

The trial court, however, ruled that the petitioners' state law claims for breach of contract, negligence, negligent misrepresentation, outrage and fraud were not "related to" an employee benefit plan; therefore were not barred by ERISA, and denied Phillips' motion to dismiss these claims.

Phillips then filed a motion for discretionary review with the Washington State Court of Appeals, the state intermediate appellate court, seeking to have the appellate court review the trial court's refusal to dismiss the petitioners' remaining state law causes. The Court of Appeals accepted discretionary review, the matter was heard, and the decision of the trial court was affirmed. Petitioners' App. A-17 to A-40.

Phillips next petitioned the Washington State Supreme Court, requesting that they accept discretionary review of this matter. Again, the Washington State Supreme Court granted discretionary review, the matter was heard and the Washington State Supreme Court reversed the decisions of the court of appeals and the trial court, finding that petitioners' remaining state law causes of action were, in fact, "related to" an employee benefit plan, and thus, were preempted by ERISA. *See* Petitioners' App. A-41 to A-80.

III. SUMMARY OF ARGUMENT

Petitioners' Petition for Writ of Certiorari should be denied. The analysis of the Supreme Court for the State of Washington in dismissing the petitioners' state law causes of action is correct and consistent with ERISA preemption law.

An insightful review of the gravamen of the petitioners' Complaint and Amended Complaint establishes conclusively that their state law claims "relate to" and, therefore, are preempted by ERISA. The petitioners

unsuccessfully attempt to overcome this clear fact by citing several cases which purportedly are inconsistent with the decision rendered by the Supreme Court for the State of Washington in this case. The petitioners' argument, however, is illusory. A critical review of the cases cited by the petitioners establishes that these cases are analytically flawed or factually distinguishable. In fact, decisions of the Court and the circuit courts of appeals based upon facts similar to those presented here hold that such state law claims "relate to" and are, therefore, preempted by ERISA.

The Petition for Writ of Certiorari should, therefore, be denied.

IV. ARGUMENT

GROUNDS WHY CERTIORARI SHOULD BE DENIED.

A. The Petitioners' Complaint And Amended Complaint Establish That Their State Law Causes Of Action "Relate To" An Employee Benefit Plan.

There is a reason the petitioners quote in their petition only a sentence and a half from their entire thirteen-page complaint. Their own complaint does not support their claim that their state law claims are unrelated to and, therefore, not preempted by ERISA. The petitioners are merely trying to distance themselves from their own allegations.

Claiming that their action is and has always been a "wrongful termination" action unrelated to ERISA (*See* Petition, p. 22), petitioners simply ignore the facts and their own pleadings. The petitioners' Complaint and subsequent Amended Complaint *explicitly assert* causes of action for breach of fiduciary duty under ERISA (29 U.S.C. § 1109) and interference with attainment of ERISA benefits (29 U.S.C. § 1140). *See* App. A-7 and A-23. Ignored is the fact petitioners' first and primary damage claim is for "frustration of retirement and other benefits

due plaintiffs and wrongfully denied or withheld by defendant Phillips." *See* App. A-11 and A-25.

Petitioners' Complaint and Amended Complaint speak for themselves, and establish conclusively that the petitioners' state law causes of action are preempted by ERISA. This undeniable fact was recognized by the Washington Supreme Court in its decision in this matter. *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 881 P.2d 216 (1994).

1. Purpose And Scope Of ERISA.

ERISA is a comprehensive remedial statute, the purpose of which is to protect the interests of employees and welfare plans (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)), and to protect employers from conflicting and inconsistent state laws and regulations. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). The former purpose is achieved through a comprehensive system of reporting, disclosure, funding and the establishment of fiduciary duty and claims procedures.

The latter purpose is achieved through federal preemption of state law, including, "decisions, rules, regulations or other State actions having the effect of law, of any State." 29 U.S.C. § 1144(c)(1); *See, FMC Corp. v. Holliday, supra* at 60.

To this end, ERISA has established federal causes of action, supplanting and replacing preempted state law for the recovery of benefits due under pension and welfare plans (29 U.S.C. § 1132), for breach of fiduciary duty (29 U.S.C. § 1109), and for interference with protected rights (29 U.S.C. § 1140).

The corresponding ERISA preemption clause is quite broad. ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any

employee benefit plan . . . " (Emphasis Added). 29 U.S.C. § 1144(a). Not only is the ERISA preemption clause expansive on its face, it has also been interpreted by the Court in this manner.

> The pre-emption clause is conspicuous for its breadth. (Cite Omitted) Its "deliberately expansive" language was "designed to . . . establish pension plan regulation as exclusively a federal concern." (Cites Omitted) The key to § 514(a) is found in the words "related to." Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause "applicable only to state laws relating to the specific subjects covered by ERISA." (Cite Omitted)
>
> . . .
>
> "A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (Cite Omitted) Under this "broad common sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. (Cite Omitted) Pre-emption is also not precluded simply because a state law is consistent with ERISA's substantive requirements. (Cite Omitted)

Ingersoll-Rand v. McClendon, 498 U.S. 133, 138-39 (1990).

In this vein, to the extent state law causes of action for fraud, misrepresentation, breach of contract, negligence, and infliction of emotional distress "relate to" an ERISA plan within this expansive definition of the phrase, said causes of action are preempted. *Ingersoll-Rand, supra* at 136. ("McClendon sought compensatory and punitive damages under various [state law] tort and contract theories"); *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir. 1991) (state law fraud and negligent misrepresentation claims preempted); *Tingey v. Pixley-*

Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992) (ten state law causes of action preempted); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (state law bad faith and emotional distress claims preempted).

The preemptive effect of ERISA applies whether or not a plaintiff explicitly asserts an ERISA cause of action. *Ingersoll-Rand, supra* at 136. And in this regard, the Court should not look to a mere sentence and a half quoted by the petitioners, but should look to the four corners of the complaint and beyond to determine, pursuant to the well-pled complaint rule, whether the petitioners have asserted claims "related to" an ERISA plan. *See, e.g., Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984).

2. The Gravamen Of Petitioners' Complaint Establishes That Their State Law Claims "Relate To" And Are, Therefore, Preempted By ERISA.

In their attempt to avoid the clear application of ERISA preemption, the petitioners, in a chameleon-like-fashion, have now and in the past characterized their complaint in many different ways. Their argument, however, is betrayed by the very fact they do not cite to either of their complaints, nor are they apparently willing to attach their complaints as part of their appendix in support of their petition. Specifically, if a plaintiff had a claim fully unrelated to ERISA, one would expect that the first pleading he or she would present in his or her own defense is his or her complaint, the summary statement of the cause of action. Petitioners did not, in this case, because their complaint does nothing but undermine their argument. An objective review of both petitioners' Complaint and Amended Complaint establishes unequivocally that their action is "related to" an ERISA plan and, therefore, their state law causes of action are preempted.

Petitioners in both of their complaints assert that Phillips represented that it had contracted with Cepex,

Inc., for their protection so that benefits that had accrued while they were with Phillips would remain intact for a minimum of two years. *See* App. A-4 and A-16. Petitioners further allege that Phillips represented:

> . . . that plaintiffs' (petitioners') retirement benefits as earned would stay with defendant Phillips; and that plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. The complaints continue by claiming:

> On April 3, 1986, defendant Phillips announced a "special separation program," including enhanced retirement benefits, severance pay, outplacement, and housing assistance, and a "certain thrift plan," including medical and life insurance benefits.

See App. A-5 and A-18.

> Based upon the previously-mentioned assurances given to plaintiffs (petitioners) by defendant Phillips, plaintiffs (petitioners) Cutler, Carrieres, Daiss, Gust, and Paul, attempted to take advantage of the "special separation program" of April 3, 1986. Plaintiffs (petitioners) believed they were qualified to take advantage of that program due to the aforementioned representation and assurances. Those requests were denied by defendant Phillips. Plaintiffs (petitioners) were told that they were no longer Phillips "employees" on April 3, 1986.

See App. A-6 and A-18.

> Any attempts by plaintiffs (petitioners) to stay with Phillips had been denied, and they were vigorously encouraged by defendant to follow the transfer of assets to Cepex, while employees of higher rank with Phillips' fertilizer division had been allowed to stay long enough to take

> advantage of the "special separation program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs (petitioners).

See App. A-6 and A-19. Alleging they were subsequently laid off by Cepex, Inc., petitioners finally asserted as the motive for Phillips' actions:

> By offering the early retirement program, selling employees as assets, and by refusing to allow employees, including certain of the plaintiffs (petitioners) an opportunity to take advantage of the early retirement program, defendant Phillips received a windfall from its retirement or pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt and to fight any hostile takeover bid.

See App. A-6 and A-19.

Petitioners affirmatively incorporated each of these allegations in all seven causes of action and sought damages for "frustration of retirement and other benefits due to plaintiffs (petitioners) and wrongfully denied or withheld by defendant Phillips." *See* App. A-11 and A-25.

Phillips strongly denies these allegations, except for the statements regarding the existence and nature of the special separation program. However, in light of these direct and pointed allegations concerning interference with the attainment of benefits, it is clear that the petitioners' claim in their original and First Amended Complaints are "related to" an employee benefit plan within the meaning of 29 U.S.C. § 1144(a).

The clearest evidence that petitioners' claims "relate to" an ERISA plan is the fact that their first cause of action, seventh in their First Amended Complaint, specifically alleges ERISA 29 U.S.C. § 1109 and § 1140 causes of action. *See* App. A-7 and A-23. In their petition, however, the petitioners attempt to purvey the disingenuous impression that from the very beginning they

had only ever sought to bring a "wrongful termination" claim and never contemplated the impact of ERISA.

Petitioners cannot avoid the ERISA controlled gravamen of both their original and First Amended Complaints, when read as a whole. The Washington State Supreme Court rendered its decision based on the gravamen of these complaints when it determined that the petitioners' state law causes of action were preempted by ERISA. Petitioners cannot change this fact by claiming that their complaint really is something other than what they twice stated it to be.

B. Contrary To Plaintiff's Contention, The Washington State Supreme Court Decision In This Case Is Consistent With The Court's Holdings And Other Recent Circuit Court Of Appeals' Decisions.

In an attempt to give the impression that the Washington State Supreme Court decision in *Cutler v. Phillips Petroleum Co., supra,* is contrary to the holdings of the Court and "the vast body of federal case law interpreting ERISA preemption" (Petition, p. 25), the petitioners cite several lower court and state court cases. This is a false impression, however. These cases and their holdings are based on modes of analysis and interpretation of ERISA that have subsequently been rejected by the Court and the various courts of appeals or are clearly factually distinguishable.

1. A Claim Under ERISA Need Not Directly Concern Plan Administration or Proper Processing of Benefits.

Prior to the Court's decision in *Ingersoll Rand v. McClendon, supra,* there was a line of case law that held that for a claim to "relate to" ERISA, it must directly involve plan administration or improper processing of benefits. This analysis arose out of a misinterpretation of

the Court's opinion in *Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1 (1987). In *Ingersoll-Rand v. McClendon, supra*, the plaintiff, McClendon, made this same argument and claimed that because his claim focused on his employer's decision to terminate his employment, his claim was not preempted. *Ibid.* at 141. Explaining the flaw in McClendon's argument, the Court stated that if only causes of action relating to plan administration and benefit processing were preempted, plan sponsors would be burdened by having to comply with conflicting substantive standards "requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction," which is exactly what 29 U.S.C. § 1144(a) seeks to foreclose. *Ibid.* at 142.

This flawed analysis was also noted by the Ninth Circuit Court of Appeals in *Olson v. General Dynamics Corp., supra*, stating:

> As to the argument that Olson's allegations do not "relate to" the administration of an employee benefit plan, the short answer is that neither the statute nor the Supreme Court's pronouncements upon it have suggested such a requirement. Surely, a claim can be said to have a "connection with" or make "reference to" a plan without it concerning the technical aspects of the plan's administration.

Ibid. at 1421.

A review of *Cuoco v. Nynex, Inc.*, 722 F.Supp. 884 (D.Mass. 1989); *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D.Cal. 1980); *Bricker v. Maytag Co.*, 450 N.W.2d 839 (Iowa 1990); *Miller v. Lay Trucking Co., Inc.*, 606 F.Supp. 1326 (N.D.Ind. 1985); *Teper v. Park West Galleries, Inc.*, 431 Mich. 202, 427 N.W.2d 535 (1988); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989); *Martin v. Pate*, 749 F.Supp. 242 (S.D.Ala. 1990); and *Bell v. Amcast Indus. Corp.*, 607 F.Supp. 486 (S.D.Ohio 1985), cited by the petitioners, establishes that these cases are based on a very narrow and strict interpretation of ERISA that only claims

directly "related to" ERISA administration or improper handling of benefits are preempted by ERISA. As explained above, this analysis has been rejected as erroneous.

2. One Need Not Be A Plan Participant Or Beneficiary To Have Standing Under ERISA.

The petitioners argue that in order to have standing to sue under ERISA they must be a plan participant or beneficiary and since they are neither, they lack standing to sue under ERISA. The argument continues, if they cannot sue under ERISA they cannot have a claim "related to" ERISA, therefore, ERISA preemption is inapplicable in this case. An example of this method of analysis is *Stanton v. Gulf Oil Corp.*, 792 F.2d 431 (4th Cir. 1986).

This method of analysis has been rejected in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and subsequent court of appeals progeny. The Court states:

> In our view, the term "participant" is naturally read to mean either "employee in, or reasonably expected to be in, currently covered employment," (Cite Omitted) or former employees who "have . . . a reasonable expectation of returning to covered employment" or *who have "a colorable claim to vested benefits."* (Cite Omitted) In order to establish that he "may become eligible for benefits," a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. "This view attributes conventional meaning to the statutory language since all employees in covered employment and *former employees with a colorable claim to vested benefits, may become eligible."* (Emphasis Added)

Ibid. at 118-119.

In *Swinney v. General Motors Corp.*, 46 F.3d 512 (6th Cir. 1995), a case very similar to the case at bar, the Sixth

Circuit Court of Appeals elaborated further on the Court's holding in *Bruch*.

In November 1986, General Motors announced that it would gradually close its Fairfield, Ohio stamping plant. As jobs were phased out, employees were placed in a job opportunity program where they received full salary and benefits for performance of nontraditional work, such as community service. While in this program, the employees were given two basic options: they could completely sever their employment relationship with General Motors in exchange for a lump sum payment under a voluntary termination of employment program (VTEP), or they could stay in the jobs program until the plant finally closed and then go on to permanent layoff receiving an assortment of temporary benefits.

In March of 1989, after the plaintiffs had accepted their VTEPs, and eight months after the plant had closed, General Motors again offered their laid-off employees in the jobs program a new "window VTEP." After learning of the additional VTEP, the plaintiffs brought suit under various state law claims such as fraud, negligent misrepresentation and estoppel. The district court dismissed these claims, finding that they were preempted by federal law. On appeal, the same argument as the petitioners have raised here regarding participant status and standing to sue under ERISA was addressed. The sixth circuit, analyzing the Court's analysis in *Bruch*, in the standing context, stated:

> In construing § 1002(7) of ERISA in conjunction with the traditional standing concepts, we, along with a majority of circuits, have developed an exception to the general rule that a person who terminates his rights to belong to a plan cannot be a "participant" in a plan. Specifically, if the employer's breach of fiduciary duty causes the employee to either give up his rights to benefits or to fail to participate in a

> plan, then the employee has standing to challenge that fiduciary's breach. (Cites Omitted) Otherwise, a fiduciary could defeat an employee's standing to bring an ERISA action by duping him into giving up his rights to participate in a plan. ERISA should not be construed to permit the fiduciary to circumvent his ERISA-imposed fiduciary duty in this manner.

Ibid. at 518-19.

In its opinion, the sixth circuit relies on the analysis of the second circuit in *Mullins v. Pfizer*, 23 F.3d 663, 668 (1994), the first circuit in *Vartanian v. Monsanto Corp.*, 14 F.3d 697, 702 (1994), and the fifth circuit in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (1992), which also hold that if the acts of an employer or fiduciary interferes with one's participant or beneficiary status under ERISA, one nevertheless has standing to sue under ERISA. The sixth circuit concludes:

> We would clearly frustrate Congress's intent "to remove jurisdictional and procedural obstacles," if we held that ERISA preempts the plaintiffs' state law claims and yet denies them standing to pursue a federal claim. (Cite Omitted) We therefore hold that so long as a former employee would have been in a class eligible to become a member of the plan *but for* the fiduciary's alleged breach of duty, he "may become eligible" for benefits under the plan and is therefore a "participant" under § 1002(7) for purposes of standing. (Emphasis Added)

Swinney, supra at 519.

The same analysis applies equally to the petitioners' ERISA claim for interference with attainment of benefits, 29 U.S.C. § 1140. As the Third Circuit Court of Appeals states:

> By its very nature, a § 510 claim will often involve employees who claim that they did not receive benefits because of their employer's

> actions, and thus were denied an opportunity to become "participants" in the benefits. To require that employees have the status of participant where they allege that the employer's acts effectively deprived them of such status would undercut the provision and cannot be intended by Congress.

Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 672 (3rd Cir. 1988) (*vacated and remanded on other grounds*, 489 U.S. 1049 (1989)).

A review of the holdings in *Stanton, supra; Teagardener v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990); *Freemen v. Jacques Orthopaedic*, 721 F.2d 654 (9th Cir. 1983); *Deller v. Portland General Electric Co.*, 734 F.Supp. 916 (D.Ore. 1990); *Klank v. Sears, Roebuck & Co.*, 735 F.Supp. 260 (N.D.Ill. 1990); and *Yancy v. American Petrofina, Inc.*, 597 F.Supp. 490 (E.D.Tex. 1984), *aff'd* 768 F.2d 707 (5th Cir. 1985); *Morningstar v. Meijer, Inc.*, 662 F.Supp. 555 (E.D.Mich. 1987); and *Gibson v. Wyatt Cafeterias, Inc.*, 782 F.Supp. 331 (E.D.Tex. 1992), cited by petitioners, indicate that these decisions are dependent on their respective court's finding that the claimants were not "plan participants or beneficiaries." These claims appear to predate or ignore the Court's holding in *Bruch, supra*, and recent circuit courts of appeal's decisions that hold that one need only have a "colorable (but for) claim to benefits or ERISA entitlement."

3. The Other Cases Cited By Petitioners Are Distinguishable On The Facts Or The Nature Of The Claims Raised.

The petitioners also cite cases where the courts in question were correct in at least the result. However, these cases are clearly distinguishable from the instant case and fall into two categories: (1) claims alleging forms of discrimination; and (2) claims that would exist regardless of ERISA benefits. In either case, ERISA is not implicated.

In this action, the petitioners have alleged age discrimination. This claim is admittedly not "related to" ERISA, even though lost benefits may be a measure of damages. Phillips does not, nor would it contend otherwise. *See, Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988). It is for this reason that Phillips *never* sought to dismiss petitioners' age discrimination claim on these grounds and this claim is not an issue on appeal.

Nevertheless, the petitioners claim that the following *unlawful discrimination cases* are somehow indistinguishable from their negligence, fraud, negligent misrepresentation, contract and outrage claims: *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (violation of California Fair Employment and Housing Act); *Tippett v. Old Kent Bank*, 134 F.R.D. 159 (W.D.Mich. 1991) (alleging age discrimination); *Hubbard v. Southwestern Bell Telephone Co.*, 759 F.Supp. 567 (E.D.Mo. 1991) (discrimination based on mental handicap); *Schultz v. National Coalition of Hispanics Mental Health & Human Services Organizations*, 678 F.Supp. 936 (D.D.C. 1988); *Zewe v. Law Firm of Adams & Reese*, 852 F.Supp. 516 (D.C.La. 1993) (retaliatory discharge); *Jorgensen v. Prudential Insurance Co.*, 852 F.Supp. 255 (D.N.J. 1994) (retaliatory discharge); and *Yageman v. Vista Maria*, 767 F.Supp. 144 (E.D.Mich. 1991) (age and sex discrimination).

Clearly, no in-depth explanation or analysis is necessary to distinguish these cases. Had the petitioners claimed that Phillips discriminated against them based on sex, race, disability, religion, ethnic origin or the like, these claims would likewise not be subject to ERISA preemption because clearly there is no ERISA implication. Any ERISA involvement would be a mere consequence of the discriminatory practice, not a material element of the claim itself.

With the exception of the petitioners' still pending age discrimination claim, this is not the nature of the remaining claims of the petitioners in this case. As petitioners admit, their claims all relate to one occurrence

where they allege that Phillips made representations regarding future ERISA benefits, administration and entitlement. Petition, p. 9; *See* App. A-4 and A-16 and 17. It is from these representations regarding ERISA benefits that petitioners' claims not only arise, but center. These claims clearly do not concern or relate to a discriminatory practice against a class of people.[3]

With respect to the other cases cited by the petitioners, in *Jaskilka v. Carpenter Technology Corp.*, 757 F.Supp. 175 (D.C.Conn. 1991), the plaintiff, upon being fired, brought an ERISA claim and a claim for breach of a contract which would have allegedly permitted her to transfer within the company rather than be terminated. The trial court was correct in not dismissing plaintiff's "transfer" contract claim. The only involvement this contract and claim had with ERISA was that ERISA benefits could be used as a measure of damages resulting from the breach. Clearly this "transfer right contract" is not "connected with" an ERISA benefits plan nor does it "refer" thereto. Within the meaning of the phrase "related to," as defined by the Court in *Shaw v. Delta Air Lines, Inc., supra,* and in *Ingersoll-Rand v. McClendon, supra,* a contract relates to ERISA only if a material term of that contract "relates to," i.e., concerns ERISA benefits, administration or entitlement. In *Jaskilka,* this was clearly lacking. However, in this case the principal terms of the petitioners' alleged contract directly concern ERISA benefits.[4]

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[3] Petitioners did assert an ERISA 29 U.S.C. § 1140 claim alleging that Phillips discriminated against them for purposes of interfering with their attainment of ERISA benefits. However, this claim and the petitioners' claim for breach of fiduciary duty under ERISA were dismissed by the trial court for want of jurisdiction and the petitioners did not appeal.

[4] Petitioners' Complaint and First Amended Complaint allege that Phillips represented to them that all benefits obtained while under Phillips' employment would remain "intact without reduction for a minimum of two years after the

It is clear from the petitioners' complaint that ERISA and ERISA benefits are a major part of their breach of contract claim, and as such, is distinguishable from the *Jaskilka* case where the contract had no relationship to ERISA.

Likewise, in *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir. 1989), the Fifth Circuit Court of Appeals describes the plaintiff's claim as follows:

> Rather, Hartle asserts that as a matter of Mississippi law, his participation in various phases of GM's employment benefit plan has changed his at-will employment status with Packard to one which conferred tenure.

Ibid. at 356. Hence, Hartle claimed that his ERISA participation turned his employment status from one of being at-will to a contractual employee under Mississippi law. The material issue was not ERISA application but whether Hartle had an employment contract and whether that employment contract was breached. The court

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date of sale to Cepex without reduction or elimination." *See* App. A-4 and A-16.

> . . . that plaintiffs' (petitioners') retirement benefits as earned would stay with the defendant Phillips; and that plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. The petitioners conclude in their third cause of action that:

> The affirmative conduct and actions of defendant Phillips including its meetings with plaintiffs (petitioners) *and assurances regarding benefits given to plaintiffs (petitioners) constituted a valid and enforceable contract in one of the following forms.* . . . (Emphasis Added)

See App. A-9 and A-21. Clearly petitioners are alleging a breach of contract which not only "relates to" ERISA but whose whole purpose concerns ERISA benefits.

explained why this claim did not "relate to" ERISA as follows:

> These claims are only peripherally connected to the concerns addressed by ERISA. None of these connections warrant a finding that the state laws "relates to" a cover plan for purposes of preemption.

Ibid. The court determined that any ERISA involvement was merely incidental to Hartle's real claim that he was a contractual employee. In the case at bar, the issue of ERISA benefits and ERISA application is far from incidental, but is a driving force behind the petitioners' state law claims.

In *Totten v. New York Life*, 682 F.Supp. 731 (D.Conn. 1987), the plaintiff alleged several state law causes of action and breach of an employment contract. The court dismissed all claims except the employment contract claim on the grounds that they were preempted by ERISA. The court explained:

> Thus, since plaintiffs have claimed that those contracts restricted defendant's right to terminate their employment, rather than affect their interest in pension benefits, and since such claims must be taken to be true, defendant has not met its burden of establishing a basis for preemption as to plaintiffs' claims for breach of their employment contracts.

Ibid. at 732. In essence, the trial court found that an employment contract is not related to ERISA if it does not affect one's interest in benefits. In this respect, the court is certainly correct. An employment contract, in and of itself, is not preempted by ERISA. However, petitioners here are not alleging breach of an employment contract, nor are they alleging a breach of a contract disassociated from an ERISA plan. The review of both of petitioners' complaints establishes clearly that their overall gravamen "relates to" ERISA benefits. Further, petitioners' contract

claim specifically refers to a "contract for benefits." *See* App. A-21.

In *Gould, Inc. v. Pension Benefits Guaranty Corp.*, 589 F.Supp. 164 (S.D.N.Y. 1984), Gould, Inc. as guarantor of a pension plan which failed to make the required contributions to an employee pension fund, entered into settlement negotiations with the claimants and their union and agreed to pay a certain amount upon receipt of a release from the union and the individual claimants. Subsequently, the issue of accrued interest arose as a result of the protracted negotiations. The trial court ruled that whether Gould was required to pay interest was a question of intent and a state law contract issue:

> The central factor is the contract negotiated at arms-length by Sonotone, Pindyck, Gould and the Union. Thus, this Court concludes that ERISA does not apply in the instant case because relevant state laws only in the most remote and peripheral manner touch upon pension plans.

Ibid. at 168. In essence, the court recognized that ERISA was only peripherally related, and the central issue involved the terms to which the parties agreed with respect to interest. As noted above, such is not the case here. Petitioners' claims center around ERISA benefits and ERISA application, and these are central terms to the alleged contract. Clearly, the existence of a pension plan is not an ancillary and inconsequential fact, it is the very heart of the case at bar.

In *Forbus v. Sears, Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), the plaintiffs were advised by Sears that it intended to shut down its retail distribution center in Birmingham, Alabama, as of December 31, 1989. The plaintiffs were offered a voluntary retirement program and advised that if they did not accept the plan, they would be terminated as of December 31, 1989, without benefits. Accordingly, each of the plaintiffs voluntarily retired and participated in the program. In January of

1990, plaintiffs learned that their facility had become a "Cross-Dock Center" rather than shut down. Consequently, they requested reinstatement but were denied. The Eleventh Circuit Court of Appeals described the plaintiffs' claims as follows:

> In contrast, the plaintiffs' claims in this case center on Sears' alleged fraud concerning the elimination of the plaintiffs' jobs, not fraud concerning an ERISA plan or any other benefits package. *The plaintiffs have not claimed any fraud as it relates to the amount of pension benefits received, nor have the plaintiffs made any allegation that Sears misrepresented the availability of pension benefits to the plaintiffs.* Simply put, the plaintiffs contend that Sears lied when it informed them that their jobs were being eliminated. (Emphasis Added)

Ibid. at 1406.

In contrast, in this case, the petitioners' complaint specifically alleges:

> The plaintiffs (petitioners) relied upon these actions, representations and assurances with the belief that Cepex would assume all benefit administration due to the plaintiffs (petitioners) from the defendant Phillips; that plaintiffs' (petitioners') retirement benefits as earned would stay with defendant Phillips; and that the plaintiffs (petitioners) would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex.

See App. A-4 and A-17. Further, the petitioners specifically alleged that Phillips represented to them that it would protect each of them by contracting or otherwise agreeing with Cepex concerning their benefits, and assured them that the benefits accrued during their employment with Phillips would remain intact without reduction for a minimum of two years. *See* App. A-4 and A-16. Thus, the material facts, upon which the eleventh

circuit rendered its opinion in *Forbus* that there was no ERISA preemption, distinguishes it from this case. Here, the petitioners explicitly, clearly and unequivocally allege that Phillips made representations regarding the nature, extent and availability of employment benefits on which they relied to their detriment.

Finally, in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the former employees of an oil refinery brought suit on state law contract and tort grounds arising from Gulf Oil's alleged failure to provide severance pay due them and for Gulf Oil's alleged improper negotiations with the subsequent purchaser of the refinery over the terms of their future employment. The plaintiffs in *Scott* alleged:

> . . . that Gulf, without their consent, negotiated with Thrifty over the terms of plaintiffs' future employment with Thrifty, and that Gulf joined with Thrifty to coerce them into accepting a new employment contract with Thrifty that contained terms less favorable to them than their contract with Gulf. Plaintiffs allege that as a result of such unauthorized negotiations and such coercion, they lost both severance benefits that they had accumulated while working for Gulf, and benefits that they would have accumulated while working for Thrifty. We shall refer to the latter as "prospective benefits."

Ibid. at 1505. The Ninth Circuit Court of Appeals held that to the extent the plaintiffs' claims concerned benefits already accumulated while working for Gulf, such claims were preempted by ERISA. However, insofar as the claim alleges the loss of "prospective benefits," the claim was not preempted.

At first blush it would appear that this case is similar to the case at bar. However, there is one important material fact that distinguishes *Scott* from the instant case. The Ninth Circuit Court of Appeals explains:

> The claim for prospective benefits does not allege the denial of benefits under a benefit plan; rather, it alleges *Gulf's tortious action prevented the existence of such a plan in plaintiffs' employment with Thrifty.* (Emphasis Added)

Ibid. The significance of this fact in regard to the opinion is clearly expressed in *Olson v. General Dynamics, Corp., supra*,[5] a case factually similar to this action. In *Olson*, the plaintiff argued, as petitioners argue in their petition (Petition p. 52), that pursuant to *Scott*, claims for "prospective benefits" are not preempted by ERISA. This argument was flatly rejected by the Ninth Circuit Court of Appeals:

> *Scott* is easily distinguished. Olson argues that it establishes a rule that claims for prospective benefits are not preempted by ERISA. In fact, the only reason that the claim for prospective benefits was held not to be preempted was because the company for which plaintiff-employees worked did not have an employee benefit plan. After noting that a claim cannot "relate to" a plan that does not exist, we allowed the employees to proceed with their tort claim because it was based on the conduct which led to the non-existence of such a plan. *Scott*, 754 at 1505-06.

Olson, supra at 1421. Like *Olson*, this is not a case where tortious actions prevented the existence of an ERISA plan with a subsequent employer. This is a claim that alleges that acts by Phillips prevented the petitioners from receiving additional benefits from Phillips that they should have otherwise received.

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[5] The Fifth Circuit Court of Appeals is also strongly critical of the *Scott* decision and questions its continuing validity in light of more recent United States Supreme Court decisions. *See Lee v. E.I. Dupont*, 894 F.2d 755 (5th Cir. 1990).

The impressive list of cases petitioners cite in serial fashion in an attempt to create the impression that the Washington State Supreme Court decision in this case is somehow contrary to the "vast body of federal case law," in reality is illusory. These cases do not withstand rigorous analysis and, as demonstrated below, the Washington State Supreme Court's decision in this case is, in fact, consistent with established ERISA preemption law.

C. Decisions In Similar Cases Establish That The Washington State Supreme Court's Decision In This Case Is Consistent With ERISA Preemption Law.

The crux of the petitioners' claim for damages in this case centers on their contentions that Phillips (1) allegedly induced them to accept employment with a purchasing company for the purpose of preventing their attainment of benefits, (2) refused them transfer into other areas of the company when the fertilizer business was sold, and (3) refused to allow them to participate in a "special separation program" while permitting more senior employees to do so. This was allegedly done so that Phillips would receive a windfall profit to their pension plan by preventing the petitioners from obtaining plan benefits. *See* App. A-6 and A-19. This is, in essence, the very same claim raised by the plaintiff in *Ingersoll-Rand v. McClendon, supra.*

In *Ingersoll-Rand*, the plaintiff was terminated when his employer claimed external economic factors mandated a work force reduction. McClendon's termination came four months prior to the vesting of his retirement and pension benefits, at which time his employer would have had to contribute to his pension fund. McClendon sued for beach of contract, breach of the duty of good faith and fair dealing, and wrongful discharge to avoid contributions to a pension fund, and to avoid paying commissions on a sale. The Texas Supreme Court reversed summary judgment for the employer, holding that McClendon stated a claim which

provided a public policy exception to employment at-will and remanded the case for trial. *McClendon v. Ingersoll-Rand*, 779 S.W.2d 69 (Tex. 1989). The Court reversed, stating that under an explicit or implicit analysis, McClendon's state law cause of action would be pre-empted. *Ingersoll-Rand, supra* at 138. The Court held that not only was McClendon's claim preempted because of its relationship to a pension plan, but also because it alleged that he was terminated to prevent him from obtaining plan benefits, a "prototypical" violation of 29 U.S.C. § 1140. *Ibid.* at 143. This is the very same "interference with attainment of benefits" claim that the petitioners make in this case. *See* App. A-7, ¶ XV and A-23, ¶ XXIII.

Finally, the Court addressed the Texas Supreme Court's attempt to distinguish the case on the grounds that McClendon claimed he was not attempting to obtain "pension benefits."

> Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits". It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ibid. at 145. The fact that the petitioners claim that they are not seeking pension benefits, only compensation for loss of future earnings, mental anguish, etc. makes no difference. Their state law claims are preempted by ERISA.

Likewise, the petitioners' claim and the facts of this case are essentially the same as those in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992). In the *Sanson* case, plaintiff alleged that General Motors fraudulently represented to him that benefits under a special retirement program would not be offered to employees at the

plant where the plaintiff worked. Relying upon these representations, the plaintiff voluntarily retired under standard provisions of General Motors' early retirement program. The plaintiff claimed, as the petitioners claim here, but for the representations, he would have continued employment with General Motors. Shortly after Sanson retired, General Motors offered a special program for certain eligible employees at Sanson's former plant. Sanson immediately contacted General Motors and demanded that his retirement benefits be increased to the level that the special program provided. General Motors denied his request. Sanson then filed suit seeking benefits, compensation and punitive damages pursuant to state law fraud and negligent misrepresentation theories.

General Motors moved for summary judgment, which was initially denied by the district court. Thereafter, the Court rendered its decision in *Ingersoll-Rand v. McClendon, supra,* and as a result thereof, the district court reversed its prior ruling.

On appeal to the Eleventh Circuit Court of Appeals, Sanson argued, as the petitioners argue in this case, that his claim was "too tenuous to be characterized fairly as 'relating to' an employee benefit plan." *Sanson v. General Motors, supra* at 620. As in this case, Sanson claimed that the purported misrepresentation by General Motors was made with the objective of achieving a 25% reduction in salaried employees without the added expense associated with having to offer a special retirement program. Thus, the "measure of damages sought" would be against General Motors and not against a pension plan. The court of appeals upheld the district court's dismissal of Sanson's state law claims, stating:

> Based on the Supreme Court's interpretation and application of ERISA in *McClendon*, the district court properly applied *McClendon* to hold that federal law preempts Sanson's state law claims. The existence of a pension plan subject to ERISA is a critical factor in both cases. It was

> critical in establishing liability under the state's wrongful discharge law in *McClendon*. In this case, the misrepresentations relate to Sanson's retirement benefits available under GM's special retirement plan. The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a determination of damages demonstrates the relationship between the lawsuit and the special retirement plan.

Ibid. at 621.

The facts in *Olson v. General Dynamics Corp., supra*, are also essentially the same as those presented here, where the Ninth Circuit Court of Appeals affirmed the dismissal of a former employee's state law claims. The plaintiff, Olson, was an employee of Range Systems, a product line of General Dynamics, for more than 30 years. In April of 1986, General Dynamics sold the Range Systems line to Amex Systems, Inc., a subsidiary of Allied-Signals, Inc. At the time of the sale, executives of both General Dynamics and Amex told Olson and other Range Systems employees that they would be offered jobs at Amex, and General Dynamics promised Amex that it would not attempt to rehire any of these employees for a two-year period following the sale. Olson's claim against General Dynamics was based on the following statement made by Amex's president to the Range Systems employees:

> I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to [sic] your present position.

Ibid. at 1419. Olson accepted a job with Amex in April 1986. In January, 1988, Amex sold the Range Systems product line to SAIC, where Olson worked until his retirement in June, 1988. Subsequently, Olson filed suit claiming that his retirement benefits with SAIC were less than he would have received had he retired with General Dynamics, and thus misrepresentations were made to him. The district court dismissed Olson's fraud claim on

the grounds that it was preempted by ERISA, and Olson appealed.

Affirming the trial court's ruling, the Ninth Circuit Court of Appeals stated:

> Given the Supreme Court's directive that ERISA's preemption provision is to be construed broadly, it is difficult to see how Olson's fraud claim could be found not to "relate to" an employee benefit plan. We think that the district court conclusion that Olson's allegations "relate to" an employee benefit plan are a straightforward application of the standards established by the Supreme Court. To state his claim in the most favorable manner, Olson is alleging that, upon retirement, he received benefits from Amex and SAIC that were "considerably less" than the benefits General Dynamics and Amex led him to believe he would receive. The district court ruled that this is a claim "that he should be receiving a level of benefits which he is not." Concluding that such a claim "has a connection with" and makes "reference to" a benefit plan, the judge ruled that the state law fraud claim was preempted by ERISA.

Ibid. at 1419.

Finally, there are numerous other cases similar to the case at bar where the circuit courts of appeals have found that state law claims are preempted by ERISA. *See Christopher v. Mobil Oil Corp., supra; Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1992); *Tingey v. Pixley-Richards West, Inc., supra* (10 state law causes of action preempted); *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991) (state law wrongful termination claim preempted); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990) (state law negligence, fraud and contracts claim preempted); *Lee v. E.I. Dupont, supra* (state law fraud and negligent misrepresentation claim preempted; also questions the continuing validity of *Scott v. Gulf Oil Corp.*,

supra, in light of recent Supreme Court decisions); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (state law breach of contract claim preempted); *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66 (4th Cir. 1988); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987); and *Howard v. Parisian, Inc., supra.*

In short, and contrary to petitioners' contentions, the decision of the Supreme Court for the State of Washington in this case is fully supported by the decisions of the Court and the various circuit courts of appeal.

V. CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

DATED this 2nd day of June, 1995.

Phillips Petroleum Company

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APPENDIX

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; and MARVIN PAUL and JANICE PAUL, a marital community, Plaintiffs, v. PHILLIPS PETROLEUM COMPANY, a foreign corporation, Defendants.	No. 89200798-8 COMPLAINT FOR DAMAGES

Plaintiffs, by and through their undersigned attorneys, and for their Complaint and claims against defendant Phillips Petroleum Company, state the following, which shall be part of and applicable to all counts herein:

PARTIES

I.

At all times relevant hereto, plaintiffs Alvin Cutler, Margaret Carrieres, Bill Daiss, Larry Gust, Kenneth Jansen, and Marvin Paul were employed by defendant Phillips

Petroleum Company and based in Spokane, Washington. Presently, plaintiffs Carrieres, Cutler, Daiss, and Paul are residents of Spokane County, Washington. Plaintiff Kenneth Jansen is currently a resident of Walla Walla County, Washington, and plaintiff Larry Gust is presently a resident of Idaho Falls, Idaho.

II.

At all times relevant hereto, defendant Phillips Petroleum Company is and was a Delaware corporation with its principal place of business located in the state of Oklahoma.

JURISDICTION AND VENUE

III.

Jurisdiction of this matter is properly in this Court as the amount in controversy exceeds $10,000.00 and there is complete diversity of citizenship, 28 U.S.C. § 1332; and that this case involves the interpretation of federal statutes and laws. 28 U.S.C. § 1331.

IV.

Jurisdiction is properly in this Court concerning any claims brought pursuant to 29 U.S.C. § 1101 et seq., based upon the concurrent jurisdiction of the Courts of the United States and State Courts of competent jurisdiction, 29 U.S.C. § 1132(e)(1).

V.

Venue is properly in Spokane County. This case is not duplicative of an action pending in the Benton County Superior Court, Cause No. 88-2-00556-4.

FACTS

VI.

Prior to December 1985, the plaintiffs herein had been loyal and valued employees of defendant Phillips Petroleum Company (hereinafter referred to as "Phillips"), and most recently in defendant Phillips' fertilizer division in Spokane, Washington, as follows: Alvin B. Cutler, over 29 years of service, most recently as manager of financial services; plaintiff Margaret E. Carrieres, over 19 years of service, most recently as a business clerk; plaintiff Bill E. Daiss, over 29 years of service, most recently as Northwest Regional sales manager; plaintiff Larry O. Gust, over 26 years of service, most recently as a marketing representative; plaintiff Kenneth J. Jansen, over 31 years of service, most recently as a marketing representative; and plaintiff Marvin Paul, over 22 years of service, most recently as a marketing representative.

VII.

In December of 1985, and in light of threatened hostile takeover activity by certain investment entrepreneurs, defendant Phillips chose to financially restructure its corporate organization, in part by selling certain assets for cash, in order to liquidate debt. This included defendant Phillips' proposed sale of the Spokane division assets,

and their employees, to Cepex American of Amarillo, Texas.

VIII.

In December 1985, defendant Phillips' management team represented to the plaintiffs their benefit options with defendant Phillips and the employment and benefit options available from buyer Cepex. Defendant Phillips represented to the plaintiffs that Phillips had protected each of them by contracting with Cepex concerning salary and benefits, and assured the plaintiffs that any Phillips salary and benefits accrued would be intact without reduction for a minimum of two years after the date of sale.

IX.

Likewise, in December 1985, Phillips assured the plaintiffs that the sale of the fertilizer assets would be to a company with the financial ability and commitment to run the business for a substantial period of time. From these representations and assurances, the plaintiffs relied with the belief that Cepex would assume all benefit administration due to plaintiffs from defendant Phillips; that plaintiffs' retirement benefits as earned would stay with defendant Phillips; and that the plaintiffs would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex. Thereafter, defendant Phillips effected the sale of the fertilizer assets to Cepex on March 1, 1986.

X.

Plaintiff Jansen did request a transfer within the Phillips structure, as others were doing so and being retrained, but those requests were denied. Based upon the aforementioned representations and assurances, the other plaintiffs assented to the transfer of employment to Cepex, without request for transfer within the organizational structure of defendant Phillips. However, it soon became apparent that Cepex did not intend to continue operations of the fertilizer division.

XI.

On April 3, 1986, defendant Phillips announced a "Special Separation Program," including enhanced retirement benefits, severance pay, outplacement and housing assistance, and a "certain thrift plan," including medical and life insurance benefits. The plan provided for enhanced retirement benefits if an employee chose to separate from defendant Phillips during a "window period" from April 3, 1986, through July 1, 1986. The plan further provided that: "Employees age 55 or older during 1986 may begin monthly retirement benefits on or after May 1, 1986, or they may take the cash payment option." The special separation program further provided:

> For employees age 50 or older this year, but not yet age 62 as of July 1, 1986, a limited Social Security make-up payment will be available if benefits begin prior to age 62. If the case payment option is selected, the value of the limited Social Security make-up payment also will be paid in cash.

XII.

Based upon the previously-mentioned assurances given to plaintiffs by defendant Phillips, plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul attempted to take advantage of the "special separation program" of April 3, 1986. The plaintiffs believed they were qualified to take advantage of that program due to the aforementioned representations and assurances. Those requests were denied by defendant Phillips. The plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul were told they were not Phillips "employees" on April 3, 1986. Plaintiff Jansen remained employed beyond the "window period," and was then retired by Phillips without choice and without an opportunity to take advantage of the April 3, 1986, program.

XIII.

Any attempts by plaintiffs to stay with Phillips had been denied, while employees of higher rank in the Phillips' fertilizer division had been allowed to stay on long enough to take advantage of the "special separation program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs.

XIV.

By offering the early retirement programs, selling employees as assets, and by refusing to allow certain employees, including the plaintiffs, any opportunity to take advantage of the early retirement program, defendant Phillips received a windfall from its retirement or

pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt.

FIRST CAUSE OF ACTION –
BREACH OF FIDUCIARY DUTY

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XV.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully interfered with plaintiffs' rights as participants in the "special separation program" of April 3, 1986, which benefits the plaintiffs are entitled to recover, including costs and reasonable attorney's fees in amounts to be proved at the time of trial. 29 U.S.C. § 1101 *et seq.*; 29 U.S.C. § 1104, § 1105, § 1109, § 1132, and § 1140.

SECOND CAUSE OF ACTION –
BENEFITS UNLAWFULLY WITHHELD

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XVI.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully withheld benefits due to the plaintiffs for which plaintiffs are entitled to recover double damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.46.010, 49.52.050, 49.52.070.

THIRD CAUSE OF ACTION – AGE DISCRIMINATION

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XVII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips is liable for the wrongful discharge of the plaintiffs because of the plaintiffs' respective ages, all of which fall within the statutorily protected age group, RCW 49.60.205. Plaintiffs are thereby entitled to recover damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.60.010 et seq., 49.60.180.

XVIII.

Plaintiffs' cause of action for age discrimination, provided in 29 U.S.C. § 621 et seq., will be added by amendment of this Complaint after the expiration of sixty (60) days of notification to the Equal Employment Opportunity Commission. 29 U.S.C. § 626.

FOURTH CAUSE OF ACTION – NEGLIGENCE

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XIX.

Defendant Phillips, by its acts and/or omissions, breached a duty of care owed to each plaintiff. The

aforesaid negligence was the proximate cause of damages to each plaintiff, which damages will be proved at the time of trial.

FIFTH CAUSE OF ACTION – BREACH OF CONTRACT

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XX.

The affirmative conduct and action of defendant Phillips, including its meetings with plaintiffs and assurances regarding benefits given to plaintiffs, constituted a valid and enforceable contract in one or more of the following forms:

1. There existed a valid and enforceable express contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

2. There existed a valid and enforceable oral contract between plaintiffs and defendant Phillips, breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

3. There existed between plaintiffs and defendant Phillips a valid and enforceable implied contract, which contract was made according to the assurances and ordinary course of dealing of defendant Phillips under similar circumstances. Defendant's breach of said contract has damaged plaintiffs in amounts to be proved at the time of trial.

SIXTH CAUSE OF ACTION – FRAUD

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXI.

The affirmative conduct and actions of defendant Phillips, throughout the discussions of asset transfer between defendant and plaintiffs, constituted actionable fraud in that defendant Phillips made material representations of existing fact which were false, either knowingly or in ignorance of the truth, with the intent that the representations be acted upon by the plaintiffs, and that plaintiffs did rightfully rely on those representations in ignorance of their falsity to their damage.

SEVENTH CAUSE OF ACTION – OUTRAGE

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXII.

Plaintiffs allege that the conduct of defendant Phillips, and its agents, was willful, wanton, intentional, and outrageous, and as a result thereof, caused damage to the plaintiffs, and each of them, including, but not limited to, mental anguish and emotional distress.

EIGHTH CAUSE OF ACTION – NEGLIGENT MISREPRESENTATION

Plaintiffs reallege paragraphs I through XIV as if fully set forth herein.

XXIII.

The aforesaid acts and/or omissions of defendant Phillips, and other acts of defendant Phillips, constitute negligent misrepresentations, the proximate cause of which damaged plaintiffs. Defendant made representations of existing facts which were false, negligently made, believed by the defendant speakers to be true, but the plaintiffs were unaware of the falsity thereof. Plaintiffs relied, as they had the right to rely, upon those statements, and the reliance upon those statements was a proximate cause of their damage.

DAMAGES.

XXIV.

The following damages suffered by plaintiffs as a proximate result of defendant's breach of fiduciary duty, negligence, breach of contract, fraud, outrage, negligent misrepresentation, and violation of statute, including RCW 19.86 et seq., and all other possible causes of action for the purposes of this Complaint include, but are not limited to:

1. Frustration of retirement benefits due to plaintiffs and wrongfully denied by defendant Phillips;

2. Expenses and monetary losses in detrimental reliance;

3. Loss of earning capacity, past and future, and/or loss of business and personal profit, past and future;

4. Mental anguish and emotional distress, and damage to the plaintiffs' respective marital communities;

5. Other compensatory, incidental, and consequential damages which are deemed just and equitable.

WHEREFORE, plaintiffs, and each of them, pray for judgment against the defendant and that plaintiffs be awarded:

1. General damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

2. Special damages suffered by plaintiffs, including double damages as allowed by law, and each of them, in amounts to be proved at the time of trial;

3. Costs of litigation, reasonable attorney's fees as allowed by law, and prejudgment interest on the amounts due each and every plaintiff; and

4. For such other and further relief as the Court deems just and proper.

DATED this **27th** day of February, 1989.

FELTMAN, GEBHARDT, EYMANN
& JONES, P.S.

By /s/ Richard C. Eymann
RICHARD E. EYMANN
Attorneys for Plaintiffs

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

ALVIN B. CUTLER and JOYCE P. CUTLER, a marital community; MARGARET E. CARRIERES and JOHN N. CARRIERES, a marital community; BILL E. DAISS and MARJOE DAISS, a marital community; LARRY O. GUST, a single person; KENNETH M. JANSEN and MARGARET V. JANSEN, a marital community; and MARVIN PAUL and JANICE PAUL, a marital community, Plaintiffs, v. PHILLIPS PETROLEUM COMPANY, a foreign corporation, Defendants.	No. 89200798-8 FIRST AMENDED COMPLAINT FOR DAMAGES

Plaintiffs, by and through their undersigned attorneys, and for their Complaint and claims against defendant Phillips Petroleum Company, state the following, which shall be part of and applicable to all counts herein:

PARTIES

I.

At all times relevant hereto, plaintiffs Alvin Cutler, Margaret Carrieres, Bill Daiss, Larry Gust, Kenneth Jansen, and Marvin Paul were employed by defendant Phillips

Petroleum Company and based in Spokane, Washington. Presently, plaintiffs Carrieres, Cutler, Daiss, and Paul are residents of Spokane County, Washington. Plaintiff Kenneth Jansen is currently a resident of Walla Walla County, Washington, and plaintiff Larry Gust is presently a resident of Idaho Falls, Idaho.

II.

Plaintiffs Davis, Lindberg, Koontz, Hoffarth, Allen, and Hoover were employed by defendant Phillips Petroleum Company at defendant's facilities nearly Finley, Washington, and previously filed suit for their claims against defendant Phillips in the matter *Jansen, et al. v. Phillips Petroleum Co.*, Benton County Superior Court Cause No. 88-2-00556-4. That case was transferred to the Spokane County Superior Court by Order dated June 19, 1990, and was consolidated with Spokane County Superior Court Cause No. 89-2-00738-8 by Order dated October 4, 1990.

III.

At all times relevant hereto, defendant Phillips Petroleum Company is and was a Delaware corporation with its principal place of business located in the state of Oklahoma.

JURISDICTION AND VENUE

IV.

Jurisdiction of this matter is properly in this Court as the amount in controversy exceeds $10,000.00 and there is

complete diversity of citizenship, 28 U.S.C. § 1332; and that this case involves the interpretation of federal statutes and laws. 28 U.S.C. § 1331.

V.

Jurisdiction is properly in this Court concerning any claims brought pursuant to 29 U.S.C. § 1101, et seq., based upon the concurrent jurisdiction of the Courts of the United States and State Courts of competent jurisdiction, 29 U.S.C. § 1132(e)(1).

VI.

Venue is properly in Spokane County.

FACTS

VII.

Prior to December 1985, the plaintiffs herein had been loyal and valued employees of defendant Phillips Petroleum Company (hereinafter referred to as "Phillips"), and most recently in defendant Phillips' fertilizer and chemical divisions in Finley and Spokane, Washington, as follows: Alvin B. Cutler, over 29 years of service, most recently as manager of financial services plaintiff Margaret E. Carrieres, over 19 years of service, most recently as a business clerk plaintiff Bill E. Daiss, over 29 years of service, most recently as Northwest Regional sales manager: plaintiff Larry O. Gust, over 26 years of service, most recently as a marketing representative; plaintiff Kenneth J. Jansen, over 31 years of service, most recently as a marketing representative: plaintiff Marvin Paul, over

22 years of service, most recently as a marketing representative.

Plaintiffs Richard A. Davis, Fred Lindberg, Jerry Koontz, David L. Hoffarth, Richard G. Allen, and Susan R. Hoover, also each had performed several years of service to the defendant while in its employ.

VIII.

In December of 1985, and in light of threatened hostile takeover activity by certain investment entrepreneurs, defendant Phillips chose to financially restructure its corporate organization, in part by selling certain assets for cash, in order to liquidate debt. This included defendant Phillips' proposed sale of the Spokane and Finley division assets, and their employees, to Cepex American of Amarillo, Texas.

IX.

In December 1985, defendant Phillips' management team represented to the plaintiffs their benefit options with defendant Phillips and the employment and benefit options available from buyer Cepex. Defendant Phillips represented to the plaintiffs that Phillips had protected each of them by contracting or otherwise agreeing with Cepex concerning salary and benefits, and assured the plaintiffs that any Phillips salary and-benefits accrued by the plaintiffs with Phillips would be intact without reduction for a minimum of two years after the date of sale to Cepex without reduction or elimination.

X.

Likewise, in December 1985, defendant Phillips assured the plaintiffs that the sale of the fertilizer assets would be to a company with the financial ability and commitment to run the business for a substantial period of time. The plaintiffs relied upon these actions, representations, and assurances, with the belief that Cepex would assume all benefit administration due to the plaintiffs from defendant Phillips; that plaintiffs' retirement benefits as earned would stay with defendant Phillips and that the plaintiffs would be eligible for early retirement benefits from defendant Phillips after the sale of the fertilizer assets to Cepex. Thereafter, defendant Phillips effected the sale of the fertilizer assets to Cepex on March 1, 1986.

XI.

Plaintiff Jansen did request a transfer within the Phillips structure, as others were doing so and being retrained, but his requests were denied. Based upon the aforementioned representations and assurances, the other plaintiffs assented to the transfer of employment to Cepex, without request for transfer within the organizational structure of defendant Phillips, and without seeking employment elsewhere. However, it soon became apparent that Cepex did not intend to continue operation of the fertilizer division.

XII.

On April 3, 1986, defendant Phillips announced a "Special Separation Program," including enhanced retirement benefits, severance pay, outplacement and housing assistance, and a "certain thrift plan," including medical and life insurance benefits. The program provided for enhanced retirement benefits if an employee chose to separate from defendant Phillips during a "window period" from April 3, 1986, through July 1, 1986. The program further provided that: "Employees age 55 or older during 1986 may begin monthly retirement benefits on or after May 1, 1986, or they may take the cash payment option." The Special Separation Program further provided:

> For employees age 50 or older this year, but not yet age 62 as of July 1, 1986, a limited Social Security make-up payment will be available if benefits begin prior to age 62. If the cash payment option is selected, the value of the limited Social Security make-up payment also will be paid in cash.

XIII.

Based upon the previously-mentioned assurances given to plaintiffs by defendant Phillips, plaintiffs Cutler, Carrieres, Daiss, Gust, and Paul attempted to take advantage of the "Special Separation Program" of April 3, 1986. The plaintiffs believed they were qualified to take advantage of that program due to the aforementioned representations and assurances. Those requests were denied by defendant Phillips. These plaintiffs were told they were not Phillips "employees" on April 3, 1986. Plaintiff Jansen

remained employed beyond the "window period," and was then retired by Phillips without choice and without an opportunity to take advantage of the April 3, 1986, program. The remaining plaintiffs continued to toil with Cepex.

XIV.

Any attempts by plaintiffs to stay with Phillips had been denied, and they were vigorously encouraged by defendant to follow the transfer of assets to Cepex, while employees of higher rank in the Phillips' fertilizer division had been allowed to stay on long enough to take advantage of the "Special Separation Program." These higher ranking employees knew of the special program or its possibility prior to March 1, 1986, yet failed to disclose its existence to any of the plaintiffs.

XV.

Notwithstanding the representations made by defendant Phillips' representatives, upon which each plaintiff relied, on or about December 26, 1986, each plaintiff was laid off or otherwise separated from gainful employment with Cepex, contrary to the assurances and representations made by defendant Phillips.

XVI.

By offering the early retirement programs, selling employees as assets, and by refusing to allow employees, including certain of the plaintiffs, any opportunity to take advantage of the early retirement program, defendant

Phillips received a windfall from its retirement or pension trust, which was thereafter used to reduce defendant Phillips' outstanding debt and to fight off any hostile takeover bid.

FIRST CAUSE OF ACTION – BENEFITS UNLAWFULLY WITHHELD ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XVII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully withheld benefits due to the plaintiffs for which plaintiffs are entitled to recover double damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.46.010, 49.52.050, 49.52.070.

SECOND CAUSE OF ACTION – NEGLIGENCE – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XVIII.

Defendant Phillips, by its acts and/or omissions, breached a duty of care owed to each plaintiff. The aforesaid negligence was the proximate cause of damages to each plaintiff, which damages will be proved at the time of trial.

THIRD CAUSE OF ACTION – BREACH OF CONTRACT – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XIX.

The affirmative conduct and action of defendant Phillips, including its meetings with plaintiffs and assurances regarding benefits given to plaintiffs, constituted a valid and enforceable contract in one or more of the following forms:

1. There existed a valid and enforceable express contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

2. There existed a valid and enforceable oral contract between plaintiffs and defendant Phillips, the breach of which has damaged plaintiffs in amounts to be proved at the time of trial.

3. There existed between plaintiffs and defendant Phillips a valid and enforceable implied contract, which contract was made according to the assurances and ordinary course of dealing of defendant Phillips under similar circumstances. Defendant's breach of said contract has damaged plaintiffs in amounts to be proved at the time of trial.

FOURTH CAUSE OF ACTION – FRAUD – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XX.

The affirmative conduct and actions of defendant Phillips, throughout the discussions of asset transfer between defendant and plaintiffs, constituted actionable fraud in that defendant Phillips made material representations of existing fact which were false, either knowingly or in ignorance of the truth, with the intent that the representations be acted upon by the plaintiffs, and that plaintiffs did rightfully rely on those representations in ignorance of their falsity to their respective damage, in amounts to be proved at the time of trial.

FIFTH CAUSE OF ACTION – NEGLIGENT MISREPRESENTATION – ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXI.

The aforesaid acts and/or omissions of defendant Phillips, and other acts of defendant Phillips, constitute negligent misrepresentations, the proximate cause of which damaged plaintiffs. Defendant made representations of existing fact which were false, negligently made, and believed by the defendant speakers to be true, but the plaintiffs were unaware of the falsity thereof. Plaintiffs relied, as they had the right to rely, upon those

statements, and the reliance upon those statements was a proximate cause of their respective damage, in amounts to be proved at the time of trial.

SIXTH CAUSE OF ACTION - OUTRAGE - ALL PLAINTIFFS

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXII.

Plaintiffs allege that the conduct of defendant Phillips and its agents was willful, wanton, intentional, and outrageous, and as a result thereof, caused damage to the plaintiffs, and each of them, including but not limited to mental anguish and emotional distress.

SEVENTH CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY - PLAINTIFFS CUTLER, CARRIERES, DAISS, GUST, JANSEN and PAUL

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXIII.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips has unlawfully interfered with plaintiffs' rights as participants in the "Special Separation Program" of April 3, 1986, which benefits the plaintiffs are entitled to recover, including costs and reasonable attorney's fees in amounts to be

proved at the time of trial. 29 U.S.C. § 1101 et seq.: 29 U.S.C. § 1104, § 1105, § 1109, § 1132, and § 1140.

EIGHTH CAUSE OF ACTION – AGE DISCRIMINATION – PLAINTIFFS CUTLER, CARRIERES, DAISS, GUST, JANSEN and PAUL

Plaintiffs reallege paragraphs I through XVI as if fully set forth herein.

XXIV.

Based upon the foregoing acts and/or omissions of defendant Phillips, defendant Phillips is liable for the wrongful discharge of the plaintiffs because of the plaintiffs' respective ages, all of which fall within the statutorily protected age group, RCW 49.60.205. Plaintiffs are thereby entitled to recover damages, costs of suit, and reasonable attorney's fees in amounts to be proved at the time of trial. RCW 49.60.010 et seq., 49.60.180.

XXV.

Plaintiffs' cause of action for age discrimination, provided in 29 U.S.C. § 621 et seq., will be added by amendment of this Complaint after the expiration of sixty (60) days of notification to the Equal Employment Opportunity Commission. 29 U.S.C. § 626. Plaintiff Jansen had previously filed a Complaint alleging age discrimination under 29 U.S.C. § 621 et seq., in *Jansen v. Phillips Petroleum Co. and Phillips Chemical Co.*, United States District Court for the Eastern District of Washington, Cause No

C-87-779-AAM, which was dismissed by that Court without prejudice on September 5, 1989, at defendant Phillips' request, as that Court found plaintiff Jansen's lawsuit therein was "substantially identical" to this Spokane County Superior Court action. Plaintiff Jansen cannot be prejudiced thereby.

DAMAGES

XXVI.

The following damages suffered by plaintiffs as a proximate result of defendant's breach of fiduciary duty, negligence, breach of contract, fraud, outrage, negligent misrepresentation, and violation of statute, including RCW 19.86 et seq., and all other possible causes of action for the purposes of this Complaint include, but are not limited to:

1. Frustration of retirement and other benefits due to plaintiffs and wrongfully denied or withheld by defendant Phillips;

2. Expenses and monetary losses in detrimental reliance;

3. Loss of earnings and earning capacity, past and future, and/or loss of business and personal profit, past and future;

4. Mental anguish and emotional distress, and damage to the plaintiffs' respective marital communities and relationships;

5. Other compensatory, incidental, and consequential damages which are deemed just and equitable.

WHEREFORE, plaintiffs, and each of them, pray for judgment against the defendant and that plaintiffs be awarded:

1. General damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

2. Special damages suffered by plaintiffs, and each of them, including double damages as allowed by law, in amounts to be proved at the time of trial;

3. Costs of litigation and reasonable attorney's fees as allowed by law, and prejudgment interest on the amounts due each and every plaintiff and

4. For such other and further relief as the Court deems just and proper.

DATED this 12th day of March, 1989.

FELTMAN, GEBHARDT, EYMANN
& JONES, P.S.

By /s/ Richard C. Eymann
RICHARD E. EYMANN,
WSBA #7470
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